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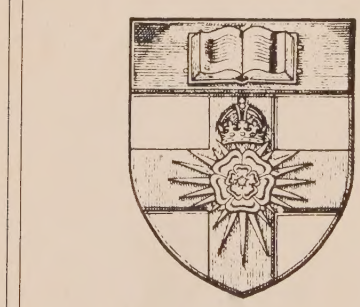

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IN

THE COURT OF APPEAL,

THE HIGH COURT OF JUSTICE,

THE COURT FOR CROWN CASES RESERVED,

IN IRELAND,

AND

THE IRISH LAND COMMISSION.

EDITED BY

T. HENRY MAXWELL,

ONE OF HIS MAJESTY'S COUNSEL.

1921.

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The Right Hon. Sir John Ross, Bart.

Lords Justices of Appeal.

The Right Hon. Stephen Ronan.

The Right Hon. James O'Connor.

King's Bench Division.

The Right Hon. Thomas Francis Molony, C.J.

The Right Hon. John George Gibson.

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The Right Hon. William Moore.

The Right Hon. Arthur Warren Samuels.

Attorneys-General.

The Right Hon. Denis Stanislaus Henry K.C.

The Right Hon. Thomas Watters Brown, K.C.

Solicitor-General.

Daniel Martin Wilson K.C.

[These Reports will be cited as follows :—[1921] 2 I. R.]

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CASES

DETERMINED BY

THE KING'S BENCH DIVISION

OF

THE HIGH COURT OF JUSTICE IN IRELAND,

AND ON APPEAL THEREFROM IN

THE COURT OF APPEAL,

AND BY

THE COURT FOR CROWN CASES RESERVED.

1921.

IN RE AN ARRANGING DEBTOR (1).

Appeal.
1920.
Nov. 1, 8.

Bankruptcy—Arrangement—Preferential payment—Contract water rate or rent—"Local Rate"—The Dublin Corporation Waterworks Act, 1861 (24 & 25 *Vict. c. clxxii*); *the Bankruptcy (Ireland) Amendment Act*, 1872 (35 & 36 *Vict. c.* 58), *sect.* 49; *Preferential Payments in Bankruptcy (Ireland) Act*, 1889 (52 & 53 *Vict. c.* 60), *sect.* 4.

Contract water rate or rent payable under the provisions of the Dublin Corporation Waterworks Act, 1861 (24 & 25 Vict. c. clxxii), is a local rate in respect of which the Corporation is entitled to preferential payment under sect. 49 of the Bankruptcy (Ireland) Amendment Act, 1872 (35 & 36 Vict. c. 58), and sect. 4 of the Preferential Payments in Bankruptcy (Ireland) Act, 1889 (52 & 53 Vict. c. 60).

APPEAL by the Corporation of Dublin from an order of Pim J., dated May 1st, 1920, declaring that contract water rate payable to the appellants was not a parochial or local rate within the meaning of section 4 of the Preferential Payments in Bankruptcy (Ireland) Act, 1889. In the arrangement matter the resolution

(1) Before SIR JAMES CAMPBELL C., and RONAN and O'CONNOR L.JJ.

Appeal. 1920. *In re* AN ARRANGING DEBTOR.

passed by the creditors and confirmed by the Court provided that the debtor should pay a composition of two shillings and sixpence in the pound on his debts, payable in two instalments of one shilling and threepence each. The Corporation of Dublin were creditors, and had sent an account of their claim to the official assignee. The claim included a sum of £7 1*s.* 8*d.*, "contract water rate," or rent due for the supply of water by meter to the debtor's business premises. The Corporation claimed payment of this sum in full as a preferential debt under the provisions of section 4 of the Preferential Payments in Bankruptcy (Ireland) Act, 1889. It was admitted that the sum claimed was due, but the official assignee submitted that the Corporation was entitled to a composition only on the debt.

The matter came before the Chief Registrar, who in his memorandum stated :—"This same point was argued before me some years ago, and *In re Mather* (1) was cited. I then made full inquiries; and, so far as I could ascertain, it has never been the practice of this Court, either of Mr. Justice Boyd, or of the late Chief Registrar, or the Chief Clerk, to treat contract water rate as a preferential debt, and I myself have always ruled that it was not preferential. I have examined the files in the two cases cited to the Master of the Rolls, and they do not bear out counsel's statement. In the case of *In re May* (1) the debt adjudicated on was a claim for ordinary municipal rates, which are undoubtedly preferential, and in *In re M'Carthy* (1), which was an arrangement matter, in which the estate was vested in the official assignee for distribution, the claim appears to have been for 'local' rates. In a case of *In re Cahill* (1), a claim by the Corporation for contract water rate was admitted for dividend. The Corporation served a notice of motion for an order that such rate should be paid in full. It appears that the official assignee, without an order of the Court, then paid the sum claimed. On the motion coming on for hearing, an order was made that the motion be struck out, and that the payment of the said claim was 'in no way to be considered or relied on as a precedent in similar applications for the payment of such contract water rates or like contract rates.' A letter on the file in that

(1) Unreported.

matter shows that in *M'Carthy's Case* (1) the water rate was paid in order to prevent the supply being cut off, as it was desired to sell the business as a going concern." Having regard to the decision of the Master of the Rolls in *In re Mather* (1), and on the application of the solicitor for the Corporation, the Chief Registrar referred the question to the Court.

Pim J. came to the conclusion that the "contract water rate," while it undoubtedly was a rate, was not a local rate, and that therefore the Corporation failed in their claim. Accordingly he refused their application for payment in full. From this order the Corporation appealed.

P. O'C. White (with him *Carrigan K.C.*), for the appellants:—

We submit that the Corporation are entitled to preferential payment of this contract water rate. Sect. 4 of the Preferential Payments in Bankruptcy (Ireland) Act, 1889, provides that all "parochial or local rates" due from the bankrupt within twelve months preceding the date of the order of adjudication shall be paid in priority to all other debts, and that they shall be paid in full unless the property of the bankrupt is insufficient to meet them, in which case they shall abate in equal proportions with the other preferential payments mentioned in the section. Sect. 10 of the Dublin Corporation Waterworks Act, 1861 (24 & 25 Vict. c. clxxii), states that "the limits" of the Act shall comprise the Borough of Dublin and a number of townships and other places, referred to as the extra-municipal districts. Any rate imposed under the Act within these limits was a local rate. The Act creates three rates: 1, public water rate; 2, domestic water rate; 3, contract water rate or rent. In respect of the first two, the Corporation are unquestionably entitled to preferential payment. Sect. 59 enables the Corporation to contract with any person to supply him with water for other than domestic uses "at such rate or rent" as may be mutually agreed on; "and the rate or rent so agreed on shall be deemed and taken to be and shall operate as a rate assessed upon the person with whom the Corporation shall so contract; and the rate so to be charged shall be collected by and paid to the Collector-General of Rates."

(1) Unreported.

Appeal. 1920. *In re* AN ARRANGING DEBTOR.

It is now collected by the Corporation. Sect. 61 says the rates or rents so charged "shall constitute a rate to be called the 'contract water rate'." Sect. 66 says that the "contract water rate," together with the other two water rates, shall be collected subject to the same regulations, and with the same powers, duties, and authorities, and shall be "subject to the like incidents," as are mentioned in an Act to provide for the collection of rates in the City of Dublin (12 & 13 Vict. c. 91). Under the latter Act the Collector-General was empowered to recover rates by distress on warrant issued by a justice. [He referred also to sects. 60, 62, 63, 65, and 67 of the Dublin Corporation Waterworks Act, 1861.]

The case of *In re Mather* (1), decided by the Master of the Rolls in 1909, in a winding-up matter, is clear authority that contract water rate is a local rate in respect of which the Corporation are entitled to preferential payment. The case of *In re Mannesmann Tube Co., Ltd.* (2), is to the same effect.

Blood K.C. and *Newett*, for the official assignee (the respondent):—

There has never been a settled practice of the Court of Bankruptcy on the question which arises here. Whenever the point arose, the Corporation claim was disputed, and, if paid, the payment was made without resort to legal argument, or any definite decision of the Court. The attitude of the Court was adverse to such claims: see *H. & Co., Arranging Debtors* (3).

"Contract water rate" is not a "local rate." A "local rate" may be defined as a tax spread over an entire locality, the assessment, applotment, and collection of which is to be borne equally by all owners and occupiers, according to the valuation of the property of which they are owners and occupiers, irrespective of whether they receive any benefit from the expenditure to meet which the rate is levied. Contract water rate becomes payable only under a personal contract voluntarily entered into. It affects only such persons within the area as contract specially with the Corporation for the supply to them of water for other than domestic purposes. The distinction between rates, rents,

(1) Unreported. (2) [1901] 2 Ch. 93. (3) 27 L. R. Ir. 271.

charges, and remuneration is clearly drawn in the Dublin Corporation Waterworks Act, 1861. Sect. 59, relied upon by the Corporation, is simply one of a group of sections, running from sect. 54 to sect. 67, limited entirely to the collection of water rates; and in every one of these (save sections 61 and 62, which deal with collateral matters) the Collector-General is specifically referred to.

The Corporation case rests mainly on the words used in sects. 59 and 66 of their Waterworks Act, declaring that the contract water rate shall be deemed to operate as and have all the incidents, &c., of a "rate"; but it is submitted that on the authority of cases governing the limited construction to be given to "deeming clauses" in Acts of Parliament, the contents of sects. 59 and 66 must be limited here to the granting of full powers to the Collector-General for applotment, levy, and collection of the contract water rate in the same manner and to the same extent as the public and domestic water rate, and that the rights of parties wholly outside the sphere and intention of the Waterworks Act could not be prejudiced. In this case, to give preferential rights in bankruptcy or arrangement to the Corporation, would mean diminishing the composition paid to ordinary unsecured creditors. Moreover, the Waterworks Act preceded by eleven years the Bankruptcy Act, 1872, by which local rates for the first time in Ireland became entitled to preferential payment in bankruptcy. As to the limited effect to be given to "deeming clauses," they cited *Hill* v. *East and West India Dock Co.* (1); *Ex parte Walton* (2); *Attorney-General* v. *Corporation of Dublin* (3).

In *Mannesmann Tube Co., Ltd.* (4), relied on by the other side, the question was not fully argued, and Kekewich J. gave no reasons for his decision. That case is criticized by the author of Ryde on Rating, 3rd ed., at p. 118, as follows:—"It appears to have been assumed that a so-called 'water rate' was within the words, 'parochial or other local rates,' in sect. 1 of the Preferential Payments in Bankruptcy Act, 1888. . . . But this assumption is open to considerable doubt. A water rate charged on the occupiers of all property alike, whether they take a supply of water

(1) 9 A. C. 448.
(2) L. R. 17 Ch. Div. 746.
(3) [1917] 1 I. R. 401, 423.
(4) [1901] 2 Ch. 93.

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or not, is no doubt very similar in character to a poor rate, or a general district rate, levied under the Public Health Acts. It is submitted, however, that the so-called 'water rate' is of a different character if it is payable only by those who take a supply, as the water is charged for by meter; in these cases the so-called 'water rate' is the price paid for water sold."

In *Badcock* v. *Hunt* (1) and *Floyd* v. *Lyons* (2) contract water rate was held not to be within a lessor's covenant to pay all rates, taxes, &c., on the ground that the liability was for payment in respect of a purely voluntary supply of water. They also referred to a dictum of FitzGibbon L.J. in *In re Greene* (3), where he expressed the opinion that contract water rate was the price of water supplied on a personal contract, and doubted that it was a proper deduction as a "rate" in a mortgagee's account.

Carrigan K.C., in reply.

SIR JAMES CAMPBELL C.:—

This case really turns on the words of the special Act, the Dublin Corporation Waterworks Act, 1861 (24 & 25 Vict. c. clxxii), and it is very difficult to conceive language that could more clearly express the intention of the Legislature. This contract water rate, or payment for water in pursuance of a special bargain between the Corporation and individual citizens, either within or outside the municipal area, is put on the same footing, and made subject to the same incidents as the other two rates mentioned in the Act. Section 59 says: "The rate or rent so agreed on shall be deemed and taken to be, and shall operate as a rate assessed upon the person with whom the Corporation shall so contract, and the rate so to be charged shall be collected by and paid to the Collector-General of Rates." Section 61 says it "shall constitute a rate," and section 66 declares that it "shall be subject to the like incidents of and with any other rate mentioned in the said last-mentioned Act," that is, an Act to provide for the collection of rates in the City of Dublin (12 & 13 Vict. c. 91). Under the latter Act the Collector-General was empowered to obtain from a magistrate a distress warrant where any person had failed to pay any of the rates or

(1) L. R. 22 Q. B. D. 145. (2) [1897] 1 Ch. 633.
(3) [1900] 2 I. R., at p. 438.

rents levied under the Act. The contract water rate was then known as pipe-water rent. It seems to us that these provisions involve not merely the incidents that then attached, but such as Parliament in its wisdom might thereafter attach. Eleven years after the passing of the Dublin Corporation Waterworks Act, 1861, Parliament enacted the Bankruptcy (Ireland) Amendment Act, 1872, which in sect. 49 declared that "all parochial or local rates" should be paid in priority to all other debts of the bankrupt or arranging debtor.

Referring back to the Dublin Corporation Waterworks Act, 1861, we find that contract water rate or rent is for all purposes put on the same footing and made subject to the like incidents as the other two water rates which unquestionably, Mr. Blood admits, get the benefit of the Irish Bankruptcy Act, 1872. I think the cases cited by counsel for the Corporation are authorities for the proposition that this contract water rate is subject to the right of preferential payment; but, be that as it may, we are all of opinion that having regard to the special language of the Dublin Corporation Waterworks Act, and to the elaborate provisions putting contract water rates on the same footing as the other rates, we must reverse the decision of Pim J., and hold that the Corporation is entitled to preferential payment.

RONAN L.J.:—I agree.

O'CONNOR L.J.:—

I concur. The Dublin Corporation Waterworks Act, 1861, seems to me to indicate in very clear and explicit language that the Corporation should have in respect of contract water rate the same rights of recovery as it has in respect of ordinary water rate. Admittedly, ordinary water rate is a local rate, and when the Bankruptcy Acts, passed later than the Dublin Act, said that local rates were to be paid in priority to all other debts, we have to ascertain what are local rates under the Act of 1861. The latter Act seems to me to put contract water rate on the same footing as public water rate and domestic water rate so far as past or future legislation is concerned.

Solicitor for the appellants: *Ignatius J. Rice.*

Solicitors for the respondent: *Bennett Thompson & McNeill.*

C. L.

Appeal.
1920.
June 3.
Nov. 22.

TYLER & SONS *v.* COUNTY COUNCIL OF CORK (1).

Malicious injury—Riot—Shop demolished—Stock-in-trade thrown into street—Larceny by third parties—Right to compensation for loss of stolen goods.

During a riot a number of soldiers demolished the shop-front of the respondent's premises, and flung a quantity of the stock-in-trade, consisting of boots, into the street. The rioters had no intention of committing, and did not commit, a larceny; but quantities of the boots were stolen by unascertained persons, who took the opportunity of plundering during the confusion caused by the riot. The respondents claimed compensation for the loss of the stock-in-trade stolen, as well as for the damage to their premises. On case stated it was found as a fact that the loss of the stock-in-trade by larceny was an immediate result of the wrecking of the premises by the rioters, and the scattering about and exposure of the goods partly in the shop and partly in the public street.

Held (O'Connor L.J. dissenting), that the entire injury was the direct result of the action of the rioters, whose sole and dominating motive was to injure property; that the larceny was the natural and probable consequence of the malicious act of demolishing the shop and scattering the goods, and that the respondents were entitled to compensation for the loss of the stolen goods.

Case Stated by Mr. Justice Samuels at the Cork Spring Assizes, 1920, under sect. 5 of the Local Government (Ireland) Act, 1898.

1. The applicants and appellants, John Tyler & Sons, Ltd., who carry on business at Fermoy, in the Co. of Cork (among other places), as retail boot-sellers, claimed £1,120 5*s.* 9*d.* for malicious injury to their premises and stock-in-trade on the 8th September, 1919.

2. The learned Recorder of Cork, sitting at Fermoy as County Court Judge for the Midleton Division, awarded the applicants the sum of £157 12*s.* 6*d.* by a decree of 23rd October, 1919. This sum admittedly represented the amount of damages to the premises of John Tyler & Sons, and to a certain portion of their stock-in-trade, which was forthcoming, but had been injured.

(1) Before Sir James Campbell C., Molony C.J., O'Connor M.R., and Ronan and O'Connor L.JJ.

The claim of Messrs. Tyler for the total loss of a large quantity of trading stock, which was not forthcoming, was rejected by the learned Recorder.

From this decision Messrs. Tyler & Sons, Ltd., appealed.

They also claimed on the appeal £20 for consequential damages for loss of profits during the period their shop was closed pending repairs. No question arises as to this sum.

3. The following facts were proved or admitted before me:— On Sunday morning, 7th September, 1919, a number of soldiers, when about to enter their place of worship in Fermoy, were attacked and fired upon by a body of civilians. Several of the soldiers were wounded, and one of them was murdered. On the following Monday evening, 8th September, 1919, about 9 p.m., a large number of soldiers, by way of retaliation, riotously attacked the premises of several traders in Fermoy, including those of Messrs. Tyler & Sons, Ltd., and scattered their stock-in-trade, which in one instance was that of a jeweller, about the street. The front windows of Messrs. Tyler's establishment were practically demolished. The shop fittings were broken and damaged, and their premises were thus left open to depredation. A very large amount of the stock-in-trade was scattered about, and heaped up in confusion, and trampled on in the shop, and a quantity of boots were flung out on the streets and into neighbouring establishments by the rioting soldiers. Some of the articles were subsequently recovered, having been brought back by the Royal Irish Constabulary and by the Christian Brothers, while odd boots were returned by various neighbouring traders, into whose premises they had been flung; but boots of the estimated value of £930 disappeared, and have never been recovered.

4. Messrs. Tyler's premises had to be closed for one week owing to their being wrecked, and I found that a consequential trading loss of £20 was thus incurred.

I assessed the physical damages done to the premises and to that portion of the stock-in-trade which was recovered at £157 12*s.* 6*d.*, the same figure as that awarded by the learned Recorder.

5. I found as a fact that the demolition of Messrs. Tyler's shop front and the scattering of their stock-in-trade was effected

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by the soldiers in the course of the riot, but that they had no intention of committing any larceny of the stock-in-trade, nor did the soldiers steal any of it. There was no evidence given by the applicants as to what actually took place during the riot, but, having regard to the way the goods were found thrown about and the means through which portion of the stock was restored and recovered, I came to the conclusion of fact that the missing articles were stolen by unascertained persons other than the rioting soldiers, who took the opportunity of plundering during the confusion caused by the riot, and I found that a loss of stock-in-trade to the amount of £822 7*s.* 6*d.* was thus caused to Messrs. Tyler & Sons as an immediate result of the wrecking of their premises by the rioting soldiers, and the scattering about and exposing of their goods partly in the shop and partly in the public street.

6. I awarded Messrs. Tyler & Sons, Ltd., £822 7*s.* 6*d.* as compensation for loss of stock-in-trade made away with under the circumstances above stated, making, together with the said sum of £157 12*s.* 6*d.* and £20, a total award of £1,000.

7. The question for the Court is: Are the applicants entitled to be awarded compensation for the loss of that portion of their stock-in-trade which was stolen by unknown persons other than the rioters, but was left open to depredation as an immediate consequence of the acts of the rioters?

8. If the answer is in the affirmative, the decree of the learned Recorder is to be increased to £1,000, with costs of appeal measured at £31 10*s.* 0*d.* If the answer is in the negative, the decree of the Recorder is to be increased by £20, making a total award of £177 12*s.* 6*d.*, but without any costs of the appeal.

9. The area of levy fixed by the learned Recorder is in any event to be varied by adding to the districts thereby made liable the urban district of Youghal.

The notice of application, the decree, and the notice of appeal are to be taken as incorporated with this case.

At the opening of the case, Sir James Campbell C. said:—The Bar and many Judges have been under the impression that Judges of Assize have power under the Malicious Injuries Code to state a case without deciding it. That is not so. They must decide it, and then, if there is a question of law, they may give leave to appeal by way of case stated.

Lynch K.C. and *H. Moloney*, for the appellants:—

The stealing of the boots by a third party was not a natural consequence of the prior malicious injury to the premises of the applicants. Larceny of the boots was not an act that could reasonably be expected as likely to occur. It could not be assumed that everybody who passed along the street was a criminal. On the question of remoteness of damage they cited *Haldwell* v. *Righton* (1); *Scholes* v. *The North London Railway Co.* (2); *Sharp* v. *Powell* (3). In *M'Dowell* v. *Corporation of Dublin* (4), Holmes L.J., at p. 556, says: "Legislation has not yet gone so far as to make the ratepayers answerable for the depredations of a thief." [They referred also to *Lord Kenmare* v. *County Council of Kerry* (5) and *In re Keane's Presentment* (6).]

M'Elligott K.C. and *Meagher*, for the respondents:—

The county is put in the position of the wrongdoer, and is liable not only for the damages due directly to the malicious act, but also for such loss as is the natural consequence of it: *Ballymagauran Co-operative Agricultural and Dairy Society* v. *County Council of Cavan and Leitrim* (7), adopted in *Noblett* v. *Leitrim County Council* (8); and *Worthington* v. *Tipperary County Council* (9). A railway company which had made an opening in a wall surrounding a cellar was held liable in damages for the theft of goods from the cellar by a man who entered by the opening: *Marshall* v. *Caledonian Railway Company* (10).

Lynch K.C., in reply.

Nov. 22.

SIR JAMES CAMPBELL C.:—

Upon the night in question a number of soldiers, breaking loose from their traditional discipline in circumstances which I need not elaborate, engaged in a riotous attack upon certain premises in the town of Fermoy. Claims for compensation under

(1) [1907] 2 K. B. 345.
(2) 21 L. T. R. 835.
(3) L. R. 7 C. P. 253.
(4) [1903] 2 I. R. 541.
(5) 34 I. L. T. R. 11.
(6) 27 I. L. T. R. 122.
(7) [1915] 2 I. R. 85, per Palles C.B., at p. 100.
(8) [1920] 2 I. R. 143.
(9) [1920] 2 I. R. 233.
(10) 36 Sc. L. R. 845.

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the Criminal Injuries Code followed, the claimants including Tyler and Sons, the well-known boot manufacturers, who claimed in respect of malicious injury to their premises and their stock-in-trade. This unlawful assembly of soldiers invaded the building, smashing doors and windows, and then proceeded to destroy the fittings and goods, trampling a portion of the latter under their feet, and hurling the remainder into the street, from which they quickly disappeared, being raided and looted by persons, if not unknown, at least undetected. No question has been raised as to the right of Messrs. Tyler in these circumstances to an award of compensation or damages in respect of the injury to their premises, and the portion of their stock which was thus destroyed or damaged, but the matter in controversy is as to the balance of the stock which was looted in the circumstances described. Part of the stock was subsequently restored to the owners through the efforts of the local clergy, but the extent and nature of the depredations become manifest by the undisputed value, over £800, which has been placed upon the remainder, which has never been recovered.

Samuels J., by whom this case has been stated, has found as a fact that the looting of these boots was not only the immediate consequence of this riotous and unlawful assembly, but was the result actually contemplated and designed by the parties who originated it. I might say of these findings "res ipsa loquitur," but in any event they are binding upon this Court, and dispose of all requirements as to whether the subsequent looting was or was not the natural or direct consequence of the previous riot. To quote the words of Lord Lindley from his judgment in *Quinn* v. *Leatham* (1): "The intention to injure the plaintiff negatives all excuses, and disposes of any question of remoteness of damage." The right to consequential damages would be of little value if it did not at least include compensation for all loss and injury which the malfeasor contemplated and intended, and which in fact occurred. Speaking for myself, I have no intention of reconsidering this question of consequential damage in its application to cases under our Criminal Injuries Code. This Court has deliberately disposed of it in *Noblett's Case* (2), following and applying

(1) [1901] A. C., at p. 537.

(2) [1920] 2 I. R. 143.

its previous decision in the *Ballymagauran Case* (1), and our judgment in the former case was subsequently justified by the concurrence of the Chief Justice and the Master of the Rolls in *Worthington's Case* (2). Nor can I attach any importance to the contention that insmuch as the boots for which the claim in this case was made were neither destroyed nor injured, they cannot be the subject of compensation, which is limited to property maliciously destroyed or damaged. This reasoning confuses the plain distinction between the original injury or destruction upon which the claim is based, and the loss or damage which is the natural and direct result thereof, in comparison with which the physical or material injury might be trifling and insignificant. It would exclude from compensation the loss of trade and custom directly consequent upon the destruction of the business premises, the stock-in-trade, the machinery, or implements essential to an industry great or small. The malicious destruction of property which was in itself of little intrinsic value, in cases where such consequential loss was the express motive and purpose of the perpetrators of the injury, might, and in many cases must, involve the person injured in heavy pecuniary loss, and compensation in such cases, if limited to the value of the particular article injured or destroyed, would be wholly illusory.

Finally, it has been contended that the carrying away of the goods thrown out upon the street was in itself a felonious act, in respect of which no civil remedy would lie against the perpetrators, unless and until they had been prosecuted to conviction, and that in consequence the loss thus sustained could not be an element in the compensation or damages to be awarded against the ratepayers. This contention was not directly raised upon behalf of the appellants on the argument in this Court; but my colleague, Lord Justice O'Connor, has since brought to our notice the cases of *Greasley* v. *Higginbottom* (3), *Smith* v. *Bolton* (4), and *Beckwith* v. *Wood* (5), decided under 1 Geo. 1, Sess. 2, cap 5, which in certain respects is similar to the Malicious Injuries (Ireland) Act, 1853. The Act in question made it a

(1) [1915] 2 I. R. 85.
(2) [1920] 2 I. R. 233.
(3) 1 East, 636.
(4) Holt, 201.
(5) 1 B. & Ald. 487

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felony, punishable with death, for persons in circumstances of riotous or unlawful assembly to demolish or proceed to demolish house property, and gave the owner the right to recover from the hundred for damage occasioned by means of the demolition.

There are several earlier cases decided under this Act in addition to those referred to by my colleague, and, having carefully considered them all, I am satisfied that, while they materially fortify the principle already established by this Court as to the inclusion of consequential loss or damage, they have long since ceased to be any authority for making an exception to this principle in the case in which the consequential injury was the result of theft or other felony. Taking these decisions in chronological order, the first is *Ratcliffe* v. *Eden* (1), decided in 1776. In that case the rioters had demolished a house in part, and destroyed or damaged a quantity of the furniture contained therein. It came before the Court, upon an agreed case, which fixed the damage to the house at £38, and to the furniture at £128, the question in dispute being this latter sum, the claimant contending that it represented consequential damage, while for the hundred it was submitted that it was a substantive and separate injury. Judgment was given in favour of the claimant without calling upon his counsel, Lord Mansfield C.J. stating that, if the Act had never been passed, the trespassers would have been liable to answer for the whole injury or damages; but, as by the Act the trespassers are to be hanged, the county had to pay the damages as an inducement to the inhabitants to be active in suppressing riots; that the whole transaction was one act, and therefore not a case of consequential damage, but the very act itself. If the rioters had broken down the doors, demolished the windows, and then left the house, and afterwards somebody had come in and destroyed the furniture, then it would have been consequential damage. I do not read these concluding words as suggesting that the claim would have failed had it been a case of consequential damage, but merely as an illustration of the distinction in fact that he draws between the actual damage inherent in the act itself and that which naturally results from it.

(1) 2 Cowp. 485.

The next case is *Wilmot* v. *Horton* (1), reported in the note to *Hyde* v. *Cogan* (2). In that case the claim was under three heads—the destruction of the house, damage to the furniture, and damage to the garden attached to the house. As to the furniture, the jury found that it was damaged at the same time as the house, and that in pulling down the house the rioters did damage to the garden. Lord Loughborough, in giving judgment, stated that antecedent to the statute, and until the particular trespass was turned into a felony, there was no doubt that against the actors and their abettors the party injured would have been entitled to recover damage for all his loss, and that the statute was an illustration of the ancient policy of the kingdom by which the men of each district were bound to maintain peace and order, and to answer for the violation of them within their own district. He then states that it was admitted that all damages were recoverable that were the necessary consequence of the demolition of the house, and adds: "Will not the principle extend likewise to those damages which, though not the necessary consequence of the felony committed, yet are clearly the immediate effect of the cause? . . . The case might be different as to consequences that are neither necessary nor immediate—if, for instance, one set of rioters had broken in on the 7th June and destroyed the house, leaving the goods in it, and the next day another party had come to the house so left and robbed it of the furniture." Even in this case he goes no further than to say that the result might be different; but the words I have quoted are a clear authority for the proposition that all damage which is the immediate consequence of the original felony is recoverable even though caused by a different act, and that a felonious one.

In *Hyde* v. *Cogan* (2) the rioters, having demolished the house, proceeded to destroy the furniture, and the jury found that it was not destroyed by means of pulling down or destroying the house, yet the Court was unanimous in disregarding this finding, and holding that damage was recoverable in respect of both, as they were practically destroyed by one and the same act. Lord Mansfield, though present, pronounced no opinion, but the explanation of this is to be found in the fact that his own house and furniture had been demolished in the same riot.

(1) 2 Douglas, 702, note.

(2) 2 Douglas, 699.

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In *Burrows* v. *Wright* (1) the rioters proceeded to demolish a bakehouse, and afterwards broke a lock of a warehouse lower down the street, throwing out some of the flour on to the street, from which it was carried away by some of their number. It was held that the subsequent attack on the warehouse was a distinct act, and, the breaking of the lock not being a felony under the statute, the damage resulting from the theft of the flour could not be recovered, as the theft was consequential on the breaking open of the warehouse and not on the destruction of the bakery. There again it will be noticed that had this substantive felony been consequential upon the attack on the bakehouse, the claim would have been admitted. It will further be seen by reference to the judgments in these three cases that the Judges were agreed that the statute was remedial, and should receive an extended construction.

I now turn to the three cases to which we have been referred by Lord Justice O'Connor. In the first of these, *Greasley* v. *Higginbottom* (2), a riotous mob had partly demolished the premises of a baker, and removed a quantity of flour, part of which they compelled him to sell to themselves at half the market price; more was thrown on the street, and wasted, and part was stolen. It was held by the Court that the owner was entitled to recover for the flour destroyed or wasted, but not for that which the rioters forced him to sell, or for what was stolen, as in these two latter cases the acts were distinct felonies. The report does not mention the judges, and contains no judgments, while no reference was made to the previous cases of *Ratcliffe* v. *Eden* (3), *Wilmot* v. *Horton* (4), or *Hyde* v. *Cogan* (5), which do not appear to have been cited. In *Smith* v. *Bolton* (6) the rioters in demolishing the house had damaged the chattels therein, and stolen money, plate, and clothes. Le Blanc J. ruled that the jury could award compensation for all damage which had been the immediate consequence of the riot, except for the property stolen, as this was a distinct felony; but it is interesting to note that while the total damage proved was £85, the jury awarded

(1) 1 East, 615.
(2) 1 East, 636.
(3) 2 Cowp. 485.
(4) 2 Douglas, 702, note.
(5) 2 Douglas, 699.
(6) Holt, 201.

£100, and judgment was given for this amount. In *Beckwith* v. *Wood* (1) a mob partly demolished a gunsmith's shop for the purpose of raiding the arms. They used some of the arms to aid them in the demolition, and others they carried away. It was held by the Court that no compensation could be recovered in respect of the arms stolen, as the theft was a distinct felony; but, with the exception of *Greasley* v. *Higginbottom* (2), none of the earlier cases was cited, and I cannot reconcile the decision with them, especially with *Wilmot* v. *Horton* (3) and *Burrows* v. *Wright* (4), in which, as I have shown, the Court clearly intimated the opinion that compensation could be recovered under the Act for a distinct felony where such felony was either part of or the immediate consequence of the original felonious demolition. I find myself unable to follow the reasoning or accept the conclusion in *Beckwith* v. *Wood* (1). The whole foundation for the grant of compensation under this Act of George 1 is the fact that by constituting the act of demolition a felony, the right to sue by civil action for the resulting damage was, as the law then stood, taken away, and consequently the injured party would have been left without redress. To remedy this injustice, the Act gave him the right to compensation against the hundred; but in deciding that this compensation would not include consequential damages which were the result of a distinct felony, the Court was, in my opinion, defeating the express purpose for which the Act was passed.

This limited construction of the Act of George 1 was considered to be so plainly contrary to the intention of Parliament in passing it that, as we are told in Bacon's Abridgment, vol. iv, p. 262, the Act of 57 George 3, c. 19, was passed, which, by sect. 38, expressly included in the subject-matter of compensation all property in the house, if destroyed, taken away, or damaged. Further, I am satisfied that these cases have long since ceased to be any authority for the proposition which they purport to decide, and may be entirely disregarded in connexion with our Criminal Injuries Code. In the first place, I fail to see how they can have any application to cases like the present, which is

(1) 1 B. & Ald. 487.
(2) 1 East, 636.
(3) 2 Douglas, 702, note.
(4) 1 East, 615.

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plainly within the language of the Grand Jury Act, 6 & 7 Wm. 4, c. 116, sect. 135, as amended and extended by the Local Government (Ireland) Act, 1898, sect. 5. The test under these sections is the malicious injury or destruction of property, and it applies without any reservation or exception in the case of felonious acts. Many malicious injuries of an aggravated kind are felonies by common law or statute, as, for example, the burning of a house, and they constantly form the subject-matter of compensation.

In *M'Dowell* v. *Corporation of Dublin* (1) the effect of the words "malice" and "malicious" in the Grand Jury Act had to be considered in this Court, and it was pointed out in elaborate judgments that our Criminal Injuries Code was much less restricted and more remedial than this early legislation in the reign of George 1, and that these words were not confined to ill-feeling against the party injured, but included all wanton acts done without excuse. No claim had been made in that case in respect of the theft, and therefore the question as to consequential damage did not arise, but the Court expressly dissented from the view attributed to Gibson J. in the Circuit case of *Wilde* v. *Armagh Co. Council* (2), that an injury was not malicious if the predominant purpose was larceny.

The contention on behalf of the appellants is therefore narrowed down to this: that no loss or damage, though consequent upon the original malicious injury, can be made the subject-matter of compensation if it is itself the result of a substantive and distinct felony. In support of this proposition reliance is placed upon the view, undoubtedly prevalent a century ago, that a civil action would not lie for damages in respect of a tort which was in itself a felony, unless or until the felon had been convicted. This doctrine was supported partly on the ground of public policy, which required that the injured party should be active in bringing the perpetrator to justice, but also on the consideration, as Lord Mansfield puts it in *Ratcliffe* v. *Eden* (3), that as the trespassers were usually hanged they were no longer available to answer in damages; while, as he might also have added, their property was forfeited to the Crown. The doctrine, however, as

(1) [1903] 2 I. R. 541. (2) 2 N. I. J. R. 169. (3) 2 Cowp. 485.

the result of more merciful legislation and the abolition of forfeiture on conviction of felony, has been so roughly handled for many years that it may be safely described as defunct.

In Pollock on Torts, 9th edition, p. 205, the old rule is stated to have been that there was no civil remedy against the felon for the wrong, at all events before the crime had been prosecuted to conviction, and after that event there would be no effectual remedy, as by the law prior to 1870 the property of the convicted felon was forfeited to the Crown; but he adds: "So much doubt has been thrown upon the supposed rule in several modern cases that it seems, if not altogether exploded, to be only awaiting a decisive abrogation." He points out, for example, that in *White* v. *Spettigue* (1) it was held to be only available in proceedings against an actual party to the felony; in *Wells* v. *Abrahams* (2) the rule itself was practically disowned, Lush J. saying that he was unable to see how it could be enforced, while Blackburn J., in an historical review of its origin and growth, held that it could not be made the subject of a plea in defence even by the felon himself, nor would a statement of claim be bad by showing on its face that the wrongful act was felonious, while the cases of *Midland Insurance Company* v. *Smith* (3) and *Roope* v. *D'Avigdor* (4) decide that it cannot be made the subject of demurrer or non-suit. In *Ex parte Ball* (5), Bramwell L.J. expressed grave doubts as to whether the supposed rule had continued to exist, while Baggallay L.J. expressly decided that a felonious act may give rise to a maintainable action, but that the policy of the law will not allow the person injured to seek civil redress if he has failed in his duty of bringing or endeavouring to bring to justice the guilty party.

In the result, this so-called rule would appear to have been reduced to this: the defendant in the civil action, if he is himself the alleged offender, may apply to the Court to stay the action, though Blackburn J., in *Wells* v. *Abrahams* (2), doubts if even this jurisdiction should ever be exercised; and some few years ago this Court, in the case of *Carlisle* v. *Orr* (6), declined to

(1) 13 M. & W. 603.
(2) L. R. 7 Q. B. 554.
(3) 6 Q. B. D. 561.
(4) 10 Q. B. D. 412.
(5) 10 Ch. D. 667.
(6) [1917] 2 I. R. 534, 540.

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interfere upon such an application in an action of seduction, where the facts as set out in the statement of claim disclosed a rape. Further, it is an application which, as decided in *White* v. *Spettigue* (1), can only be made by the felon himself in an action to which he is the defendant, and the present claim is not against the wrongdoer, but against the ratepayers, who are made by this legislation liable for compensation to the party wronged. We have decided in *Worthington's Case* (2) that it would not be right to put them in the exact position of the actual criminal for the purpose of exemplary damages, and in my opinion it would be equally unfair to the claimant to subject him to any such rule, however modified, when he is not proceeding against the person or persons guilty of the offence, more especially as in all cases under the Criminal Injuries Code in relation to property the claimant has to swear an information within three days from the date of the offence, giving full particulars of the acts, the property and the nature of the injury, and, in addition, stating whether he does or does not know any of the parties concerned, and binding himself by recognizance to prosecute if and when called upon, thereby contributing, so far as it is possible for him, to bringing the wrongdoers to justice.

It will hardly be questioned that Parliament in passing this legislation dealing with criminal injuries in Ireland was influenced by the consideration that these crimes are committed in circumstances which often baffle detection, and consequently leave the victims without remedy or redress against the actual perpetrators. I am satisfied that if we were to decide that the claimants, who in every case must make the information I have quoted, could only succeed on proof that the guilty parties had been prosecuted to conviction, we would, as in my opinion the Court did in *Beckwith* v. *Wood* (3), defeat the express purpose of the legislation. No such condition precedent has ever been suggested in claims for compensation under the Irish Code in respect of malicious injury to property where the injury itself was a felonious act; and I know of no principle or authority which compels us to apply it to the loss or damage which is the immediate or intended consequence of the injury, merely because

(1) 13 M. & W. 603. (2) [1920] 2 I. R. 233. (3) 1 B. & Ald. 487.

such loss or damage is produced by acts which in themselves are substantive and distinct felonies. It has also always been assumed, and frequently judicially stated, that this burden was thrown upon the ratepayers as a punishment for their failure in the detection of such crimes, as well as a stimulus to greater exertions in this respect for the future; and if this be true, as I think it is, it would be a strange and startling consequence if we were to deprive the innocent victims of these outrages of compensation upon the very ground upon which right to it is based by the legislation—the inability to detect and convict the perpetrators, consequent, as it may be, upon the sympathy, apathy, or intimidation of the inhabitants, or possibly, in these deplorable cases of reprisals, by dereliction of duty on the part of those to whom, under the administration of our criminal system, the special task of investigation and detection is entrusted.

Whether, therefore, the claim in this case is to be treated as coming under the Grand Jury Act or the Malicious Injuries (Ireland) Act, 1853, it must, in my opinion, be decided in favour of the claimants. The loss or damage is found as a fact to have been not only the immediate consequence of the riot, but also the consequence designed and intended by the rioters themselves. The cases that have been cited under the English Act of George 1, and the recent decisions in this Court, conclusively establish that the compensation under that Act, and under our Criminal Injuries Code, should include compensation for consequential damages, so that nothing stands in the way of the claimants' right to succeed, unless it be this effete doctrine or rule that no civil action of tort will lie in the case of a felony unless the felon has been prosecuted to conviction. I am glad to have been able, for the reasons I have given, to brush this aside; for nothing would be more deplorable or unreasonable than a decision which would deny compensation to the victims of these outrages, by whomsoever committed, and whether originated by way of attack or reprisal, merely because the outrage was in itself a felony, or attended by an act or acts felonious in themselves, and the perpetrators had escaped detection, while at the same time we are compelled to grant it to the full in all cases where the malicious injury, and the acts consequent upon it, ranged themselves under

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the head of misdemeanours—a distinction always arbitrary, and rapidly falling into disrepute. Nor can I conceive of anything more dangerous in the public interest than a decision which would enable the guilty parties to deprive the injured person of all compensation for what might be the substance of his loss, merely by following up this crime by consequential acts of felony, such as arson or larceny.

For these reasons I am of opinion this appeal should be dismissed.

MOLONY C.J. :—

I agree in the result which has been arrived at by the Lord Chancellor, but I wish to limit my concurrence to the facts of this particular case, where it is manifest that the entire injury was the direct result of the action of a riotous mob, whose sole and dominating motive was to injure property.

I do not think that the decision can or should be extended to the ordinary depredations of a thief, and in this respect I approve of and adopt the observations of Holmes L.J. in *M'Dowell's Case* (1).

If an expert professional thief breaks open a door or window in order to obtain access to a jeweller's shop, and damages the door or window to an extent exceeding £5, I cannot see why the ratepayers should be bound to make good to the owner the value of the goods, no matter how large, which the thief may succeed in carrying away. To give compensation for stolen goods in such a case would be to make the ratepayers insurers against burglary, and I cannot think that such is the result of our Malicious Injuries Code.

O'CONNOR M.R. :—

In this case a shop was raided by a riotous assembly. The shop windows were broken, the stock-in-trade was scattered; some of it was flung into the public street. Portion of the stock-in-trade was subsequently recovered in a damaged condition, but the greater part of it was lost, because it was appropriated by those who found it derelict. The object of the raiders was not robbery, but

(1) [1903] 2 I.R. 541.

simply destruction by way of retaliation for an injury done or supposed to have been done by the inhabitants of the town. The owners of the shop made a claim under the Grand Jury Act for a malicious injury. This claim was made in respect of—1, the damage done to the shop premises; 2, the damage done to the goods scattered but recovered in a damaged condition; and 3, the goods scattered and never recovered. There is no question as to 1 and 2. It is admitted that these two items were properly the subject of compensation, but it is contended by the public bodies against whom the claim is made that the loss of the goods which were scattered and not recovered is not the subject of compensation under the Grand Jury Act.

It has been argued that the loss of the goods is to be attributed to larceny, and that larceny is not a malicious injury within the meaning of the Grand Jury Act. Assuming that this is so, I hold that the malicious injury in this case was the raiding of the shop and the scattering of the stock-in-trade broadcast into the public street. The actual consequences of that injury must surely be taken into consideration in estimating the damage done. Portion of the stock-in-trade was recovered, but in a damaged condition, as was to be expected. The larger part was not recovered at all—a thing also to be expected. This was the natural, probable, and, having regard to the predatory instincts of a populace who see goods in a derelict condition, it may be said necessary, consequence of the malicious act of raiding and scattering. I cannot, therefore, see on what principle of law, once the malicious act is admitted to be the subject of compensation, the natural and almost necessary consequence should not be taken into account even though this involves the criminal act of larceny by other parties.

During the argument I put the case of the driving and scattering of cattle. It was admitted that if any of the cattle were recovered in a damaged condition, compensation should be allowed for the damage. I then asked what about the cattle that were not recovered. The case possibly only raised in another form the question we have to decide in the present case, but it seems to me to exemplify the absurdity of compensating for only a partial loss and refusing compensation for a total loss.

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It has been decided, as I understand, that larceny is not a malicious injury within the meaning of the Grand Jury Act. That may be good law in the case of larceny simpliciter, but I must hold myself free when the question comes up to decide whether larceny in certain circumstances may not be a malicious injury within the meaning of the Act.

RONAN L.J.:—

The short point in the present case is whether the claimants can recover the value of the boots thrown into the streets by the rioters, which were then stolen by third persons, not parties to the riot. It is not suggested that they were stolen by the rioters or that they had any animus furandi.

In my opinion the question in the case is one of the law of damage. The difficulty which has caused the difference of opinion in the Court arises from certain cases under the Riot Act and the Black Act, which, it is suggested, decided that damage caused by a subsequent larceny by a third person could not be recovered in an action against the hundred under those Acts, although such subsequent larceny was the obvious, natural, and probable, and almost certain result of the acts of the wrongdoers for which the hundred were made liable. The Lord Chancellor has examined these cases. They are collected in the fourth volume of Bacon's Abridgment, p. 261, and dealt with in the note to *Pinkey's Case* (1). They deal with larceny committed by a riotous mob, the wrongdoers themselves. None of them deals with larcenies by third persons, not parties to the riotous conduct. There is no decision on this question, but no such claim was made in any of the cases. The reason for this I shall try to explain later on.

The scheme of the Riot Act and of the Black Act is this: They first make certain acts felonies which were not felonies before. Prior to the Acts the wrongdoers who committed these acts could have been sued as trespassers. These statutes then specially provided that the persons injured by these acts might sue the hundred for the damage they had sustained. It would appear from the cases that the doctrine of the tort merging in the felony was then fatal to any action against the wrongdoer after the acts

(1) 2 Wms. Sanders, 758.

had been made felonies by the statute. As Lord Mansfield said in the first of these cases, *Ratcliffe* v. *Eden* (1): "If the Act had never been made, the trespassers would have been liable to answer for the whole injury in damages . . . The same law has made a further provision, that as the trespassers are to be hanged the country shall pay the damages." Aston J. puts it thus: "The object and principle of this Act was to transfer the damages occasioned by the trespass from the rioters to the hundred." This runs through all the cases, and in the last of them, *Beckwith* v. *Wood* (2), at p. 490, Lord Ellenborough says: "The statute in this case substitutes a remedy against the hundred in the place of the remedy given by the law against the original trespassers. Where the law therefore gave no such remedy, the statute can have no operation."

In that case the rioters, 1, demolished the house; 2, stole some arms. Lord Ellenborough, dealing with 2, says: "Now, what remedy was there in the case of a felonious taking against the party committing the felony? The injured party might indeed prosecute, but could have no remedy by action, and that being so, he cannot by the statute have a remedy against the hundred." Bayley J. said: "This is a case of a distinct felony. Before the statute passed no action could have been brought against the individuals concerned in it, and consequently no action can be brought against the hundred. I cannot distinguish this case from *Greasley* v. *Higginbottom* (3)." Abbott J. said: "The taking of the arms here was as complete a felony as the selling of the flour was in *Greasley* v. *Higginbottom* (3), from which I cannot distinguish this case." This is very important, as it shows that the Court was not dealing with damage caused by the larceny by third parties, but with larceny by the wrongdoers themselves.

So far, I have not mentioned anything in these cases dealing with damage resulting from the acts in respect of which an action did lie. The Court took a wide and liberal view of the statute, and held that everything could be recovered which was substantially part of the transaction. In *Ratcliffe* v. *Eden* (1) Lord Mansfield makes an addition to his judgment, which seems to

(1) 2 Cowp. 485, at p. 488. (2) 1 B. & Ald. 487. (3) 1 East, 636.

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show that at that time (1776) what he calls "consequential damage" could not have been recovered against the trespasser. In *Wilmot* v. *Horton* (1), reported in note to *Hyde* v. *Cogan* (2), at pp. 702-704, Lord Loughborough distinguishes between, 1, damage which is the necessary consequence, and 2, that which is the immediate, though not the necessary, consequence, and 3, that which is neither. He expressed the view that the two former were recoverable.

Buller J. refers to this in *Hyde* v. *Cogan* (2), but apparently expresses no opinion on it. In *Burrows* v. *Wright* (3) Lord Kenyon says: "In the case of *Wilmot* v. *Horton* (1) the damage to the garden was immediately consequential to the pulling down part of the house, and happened in the act of pulling it down. But here the damage done at the warehouse, on the opposite side of the street, was an entire distinct act, not consequential to the other." In *Smith* v. *Bolton* (4) Le Blanc J. told the jury "to estimate the damage by demolition, which had been the immediate consequence of the riot." Some plate and money were missing; the suggestion was that the rioters had stolen them. The Judge said "there was no actual proof of the removal of any of the articles; but it was difficult to conceive how the plate, clothes, or money in the till could be destroyed in the demolition of the house."

These are the only references to damage resulting from the acts of the wrongdoers that I have found in these cases. They are vague and general. But the fundamental principle of all the cases is that the plaintiff has the same remedy against the hundred as he would have had against the wrongdoer prior to the passing of the Act.

The cases rest on the law of damage as it was at the time, and proceed on the principle that, as the damage in question could not have been recovered against the defendant prior to the statute, it could have been recovered against the hundred. Lord Ellenborough's judgment in *Beckwith* v. *Wood* (5) was in 1818. In 1807 he delivered his judgment in *Vicars* v. *Wilcocks* (6),

(1) 2 Douglas, 702, note.
(2) 2 Douglas, 699.
(3) 1 East, 615, at p. 617.
(4) Holt, 201.
(5) 1 B & Ald. 487.
(6) 8 East, 1.

which is still the leading case on damages in Smith's Leading Cases. Dealing with this case, Sir F. Pollock says, in what M'Cardie J., in a recent judgment, calls "his luminous work on Torts": "There was a time when Lord Ellenborough laid it down as a general rule of law that a man is answerable only for 'legal and natural consequences,' not for 'an illegal consequence'; that is, a wrongful act of a third person. But this opinion is now disapproved:" Pollock on Torts, 10th ed., p. 346. Of course, if loss arising from a mere wrongful act of a third person could not be recovered, this applies a fortiori to crime and felony.

The history of the change in the law will be found in the notes to *Vicars* v. *Wilcocks* (1). The judgment in the modern case, which perhaps goes as far as any in limiting the rule as to damage, says the damage was not "within the ordinary consequences" of such an act as the defendant's, not "one which the defendant could fairly be expected to anticipate as likely to ensue from his act": *Sharp* v. *Powell* (2), quoted at pp. 49 and 50 of Pollock, 10th ed. At p. 347 he cites the passage from Lord Lindley's judgment, quoted by the Lord Chancellor, and says: "It does not lie in a man's mouth to say that the consequence which he deliberately planned and procured is too remote for the law to treat as a consequence . . . Commanding, procuring, or inciting to a murder cannot have any 'legal consequence' [Lord Ellenborough's expression], the act of compliance or obedience being a crime; but no one has suggested on this ground any doubt that the procurement is also a crime."

The two cases I am about to refer to were actions by passengers against railway companies for damages resulting from their failure to perform their duty. In each case the damage claimed was the result of a crime committed by third parties. In *Pounder* v. *North-Eastern Railway Co.* (3) the crime was an assault; in *Cobb* v. *Great Western Railway Co.* (4) it was robbery (felony). There is no suggestion in either case that the fact of its being the result of a crime made the damage irrecoverable. All the judgments proceed on the basis that if it could be shown that the crime was the natural and probable consequence of

(1) 8 East, 1.
(2) L. R. 7 C. P. 253.
(3) [1892] 1 Q. B. 385.
(4) [1893] 1 Q. B. 459; [1894] A. C. 419.

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defendant's wrongful act or omission the damage could have been recovered. See especially per Lord Selborne, at p. 423, in *Cobb* v. *Great Western Railway Co.* (1).

Can there be any doubt in the present case that if Tylers brought an action against the wrongdoers they could have recovered damages for the loss of their boots? The wrongdoers intended that they should lose them. If this be so, all the old cases relied on become direct authorities for the claimants: "the liability of the wrongdoer is transferred to the hundred." The old law as to damage explains why there appears no claim like the present in the old cases.

O'CONNOR L.J.:—

Some soldiers of the King, angered by the murder of their comrades, cast discipline and self-restraint to the winds, and let themselves loose in an orgy of mischief upon the usually peaceful town of Fermoy. Tyler's artistically arranged boot shop was an obvious attraction to the marauding party, who entered it pell-mell, and gave themselves up to a glorious, if brief, debauch of destruction there. Having broken everything that was breakable, they turned their attention to the large and varied stock of boots, most of which they hurled out upon the street. Some of the denizens of the interesting town, who were either unshod or insufficiently shod, or who at any rate thought they were not as well shod as their merits warranted, came along, and saw that a splendid opportunity offered itself, was unlikely to recur, and therefore on no account to be missed. Consequently, they helped themselves to the boots off the street, asported them to their homes, and in seasonable time, no doubt, displayed them under the noses of the police in what passes for church parade in the town of Fermoy. Anybody who knows anything of a country town will not be surprised that the news of a lavish, if disordered, display of excellent boots, to be had for the picking up from the highway, should spread rapidly to its furthest limits, and that numberless soles aching for better and more modern shoe leather sped to the scene. The newcomers, however, found the

(1) [1894] A. C. 419.

harvest garnered by more alert citizens, and the street swept clean of everything save its ancient mud. Still, there the shop lay, with its plate-glass windows broken; it offered easy access to the acquisitive; and when they entered, they found a not inconsiderable quantity of boots which the limited time at the disposal of the military in the operations had prevented from being sent the self-same way as their former comrades on Tyler's shelves. The ultimate result was that the shop was cleared as effectually as the street; and Messrs. Tyler have lost £800 worth of boots in the process. They have everybody's sympathy; but what we have to consider is whether they are entitled to recover the value of the stolen boots from ratepayers, who are, I hope, as deeply sorry for the outrage as any of ourselves.

The principal provision relied on by the applicants is sect. 1 of the Malicious Injuries (Ireland) Act, 1853, 16 & 17 Vict., c. 38, which, so far as it is material, runs as follows:—"If any persons in Ireland, unlawfully, riotously, or tumultuously assembled together, shall hereafter unlawfully, wantonly, or maliciously destroy or demolish or partially destroy or demolish or otherwise damage or injure any dwelling-house, outhouse, warehouse, shop, or building, or any furniture, goods, chattels, or property therein, or any goods, chattels, or property, or any growing crop, produce, or article of any person or persons, wherever situate, all damages which shall be so sustained, by any person or persons by means of any such unlawful acts or offences as aforesaid, shall and may be recovered," and so forth.

Now, as I conceive it, the question in this case is settled by several cases of the highest authority, not one of which has been cited to us in the argument. They are decided upon the construction of the English statute, 1 Geo. 2, Sess. 2, c. 5, sub-sect. 6, which is as follows:—"If any such church or chapel, or any such building, &c., or any such dwelling-house, barn, stable, or outhouse shall be demolished, or pulled down, wholly or in part, by any persons so unlawfully, riotously, and tumultuously assembled, the inhabitants of the hundred in which such damage shall be done shall be liable to yield damages to the person or persons injured and damnified by such demolishing or pulling down wholly

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or in part, and such damages shall and may be recovered by action . . . by the person or persons damnified thereby against any two or more inhabitants of such hundred."

This statute gives, in my opinion, as extensive a remedy as the Irish statute, for I can see no distinction between a person who sustains damages "by means of" (the language of the Irish statute) and a person who is damnified "by" (the words of the English statute) the offence; and in Bacon's Abridgment ("Hue and Cry" (C)) I find the actual words "by means of" used as tantamount to the words in the English statute. Now, on this statute there are several cases to which I will refer as shortly as I can. The Courts were obviously not disinclined to give a liberal construction to the statute (see judgment of Buller J. in *Hyde* v. *Cogan* (1)), more especially as some of the cases arose out of the Lord George Gordon riots in 1780, whereby, as appears from an interesting note in 2 Doug., at p. 436, Lord Mansfield himself suffered loss, for which he refused to claim, nor would he adjudicate at that period in other cases under the statute (2). It was accordingly held that, though the statute mentioned buildings, and buildings only, yet where by the same act and at the same time the chattels in the building were destroyed, it was part of the same felony, and damages could accordingly be given: *Hyde* v. *Cogan* (3), following *Ratcliffe* v. *Eden* (4) and *Wilmot* v. *Horton* (5). But in *Ratcliffe* v. *Eden* (4) Lord Mansfield said: "If there had been any distance of time, or if the goods had been carried out of the house and then destroyed, it might have been a different thing, because that would have been a distinct act." So also in *Wilmot* v. *Horton* (5) Lord Loughborough said: "The case might be different as to consequences that are neither necessary nor immediate; if, for instance, one set of rioters had broken in on the 7th of June and destroyed the house, leaving the goods in it, and the next day another party had gone to the house so left and robbed it of the furniture."

As the actual decisions in these cases stand, the reasoning of them was somewhat strained, to adopt the language of the learned

(1) 2 Douglas, at p. 706.
(2) 2 Douglas, 704.
(3) 2 Douglas, 699.
(4) 2 Cowp. 485.
(5) 2 Douglas, 702, note.

author of Comyn's Digest ("Hue and Cry" (C)), when speaking of them, and for the purpose of getting rid of this, the statute 57 Geo. 3, c. 19, was passed, bringing in chattels destroyed or damaged. The question, however, of goods actually taken away from a house that had been demolished was the subject of decision in three cases, namely *Greasley* v. *Higginbottom* (1), *Smith* v. *Bolton* (2), and *Beckwith* v. *Wood* (3). Each of these cases decides that in an action against the hundred they are liable only for things destroyed by the rioters, and not for any goods stolen. In *Greasley* v. *Higginbottom* (1) a riotous mob partly demolished the house, spoiled or destroyed some flour therein, and carried away and stole other flour. The Court were of opinion that the hundred were liable only for the damage to the buildings and for such of the flour as was spoiled or destroyed in doing that damage, but that as to the flour stolen, or what, in effect, was the same thing, taken away and sold without the consent of the plaintiffs, that being a distinct felony in the offenders, an offence that existed before the passing of the Riot Act, and not an injury done to the party by the offence in that Act, it was not within the clause giving damages against the hundred. In *Beckwith* v. *Wood* (3) a riotous mob entered a gunsmith's shop, which they partly demolished, and then carried away arms they found therein. Lord Ellenborough said: "The statute in this case substitutes a remedy against the hundred in the place of the remedy given by the law against the original trespassers. Where the law, therefore, gave no such remedy, the statute can have no operation. Now, what remedy was there in the case of a felonious taking against the party committing the felony? The injured party might, indeed, prosecute, but could have no remedy by action; and, that being so, he cannot by the statute have a remedy against the hundred. Here there was a distinct felony. . . . I am of opinion that the plaintiff cannot recover against the hundred for the value of the arms thus stolen." And Bayley, Abbott, and Holroyd JJ. concurred on the same grounds.

I have already referred to the amending English statute 57 Geo. 3, c. 19, s. 38; it brought in, specifically, goods destroyed or damaged, for the purpose stated in Comyn's Digest; it also

(1) 1 East, 636. (2) Holt, 201. (3) 1 B. & Ald. 487.

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brought in goods taken away, to get over the obvious injustice of leaving a party who had been injured by a looting and riotous mob without a remedy in respect of what might be the most substantial part of the wrong done to him. These cases seem to me to clinch the matter, so far as the 16th & 17th Vict. c. 58, or any other Irish statute is concerned. The English statute is quite as wide in its language; and the decisions and the reasons apply just as much whether the rioters commit the larceny, or other persons do so.

I conceive that we should follow cases of such high authority, even if we had any doubts ourselves on the matter. But, apart from these cases, I should have been of opinion that Messrs. Tyler could not have succeeded in respect of the stolen boots for a reason I shall state in my own language. The great bulk of Tyler's boots were thrown on the street and stolen thence. How is that larceny caused by the breaking of the windows? It followed the breaking of the windows, but it did not follow from the breaking of the windows; if it was a consequence of anything, it was a consequence not of breaking the windows, but of throwing the boots out from the shop. There may be a chain of events in an act or transaction; each of these events may have been intended by the person who did the act or transaction; but that does not mean that any of the series of events was necessarily caused by any other event which preceded it in the chain. Take a case put in the argument. A cattle drive takes place; the cattle are in a way of being stolen by being put on the highway; they are stolen. The larceny of the cattle is caused by a malicious act, no doubt; but it is not caused by the malicious damage, to wit, the laming or poor condition of the cattle caused by the drive; indeed such laming or poor condition (which is the damage) tends rather to prevent than to help the larceny. To hold otherwise, in my opinion, is to confound sequence with consequence. Furthermore, I am of opinion that the whole Malicious Injuries Code in Ireland negatives any idea of giving damages for substantive criminal acts following upon and even induced by the criminal act of malicious damage; otherwise, as it seems to me, the larceny of property by the enterprising burglar or induced by his operations would seem to be insured against by the County.

For these reasons, I am of opinion that the applicants are not entitled to claim the value of the boots stolen.

I am constrained to add a word about *Noblett's Case* (1), a recent decision of this Court, to which I was a party. I incline to the view, as a result of reflection on the statutes, aided, no doubt, by the English cases I have cited, that it may sometimes be necessary for us to construe the language of that case having regard to its subject-matter. If, as our judgments in effect say, the County Council is placed, for the purpose of sect. 135 of the Grand Jury Act, in the same position as a defendant, it would follow that if a house was burned, and the owner received personal injuries from the flames, or caught cold by having the roof burned over his head, he could recover damages for such personal injury or discomfort. That can hardly be the law, which seems to me in its scope to be confined to cases of damage to property, and not to person. However, as sect. 135 of the Grand Jury Act does not really arise here, I need say no more at present on the subject.

Solicitor for the appellants: *A. H. Exham.*
Solicitor for the respondent: *R. S. Baylor.*

C. L.

(1) [1920] 2 I. R. 143.

K. B. Div.
(Probate.)
1920.

May 14.
June 4.

WEST *v.* WEST.

(1919. No. 84.)

Will—Probate—Dependent relative revocation—Duly executed will subsequently destroyed—Proof of contents by production of draft—Later testamentary disposition signed by testator, but not witnessed—Destroyed will admitted to probate.

A. E. W. duly made his will in the month of February, 1913. He died on 9th September, 1919. After his death, on search being made for the will, it could not be found. Amongst his papers was found, however, an envelope marked "my last will, made Jan. 26, 1918," and also "one made February, 1913, destroyed." In the envelope was a testamentary writing, dated 26th January, 1918, apparently based in form on the will of February, 1913, and signed by the said A. E. W., but not witnessed. A draft of the will of February, 1913, was produced by the testator's solicitors, and put in evidence as proving the contents of the destroyed will.

In an action by the executrix of the will of February, 1913, claiming probate in solemn form of the contents thereof as proved by the said draft, it was *Held*:—1. That the destruction of the will of February, 1913, was conditional on the testator's belief that the testamentary writing of 26th January, 1918, would be effective as a will. 2. That the testamentary writing of 26th January, 1918, was not effective as a will, and that therefore the doctrine of dependent relative revocation applied. 3. That the contents of the will of February, 1913, as proved by the said draft thereof, should be admitted to probate in solemn form.

Action by Florence West, of Kilcroney, Bray, in the County of Wicklow, widow, as executrix, claiming probate in solemn form of the contents of a destroyed will dated on or about the 25th day of February, 1913, of her husband, Alfred Edward West, deceased, late of Kilcroney, aforesaid, who died on or about the 9th day of September, 1919. The defendants were the children and next-of-kin of the said deceased, namely, Major Cyril C. West, Harold R. A. West, Captain Aubrey F. West, and Mrs. Hazel V. Laverton.

The testator, Alfred Edward West, died unexpectedly at Navan, on the 9th September, 1919. He had previously made

two wills, the earlier of which, on which nothing really turns, is dated 13th January, 1889. The second will was made in the following circumstances. He and his wife had in contemplation a journey to South Africa, and in November, 1912, they went together to their solicitors in Dublin, Messrs. Webb, Scott, & Seymour. They then gave them separate instructions to have a will prepared for each of them, the object being to make provision for each other, in the event of one of them dying while abroad. It was stated that each thereby desired to leave his or her property to the other if survivor; but the testator in particular also wished to add some special legacies, chiefly to employees. The wills were accordingly prepared and sent by the solicitors to testator, and also under separate cover to the lady, on November 21st, 1912. The envelope to the testator contained the engrossment of his will, a letter covering it, and full instructions as to its execution in conformity with the Wills Act. It also contained a special letter of information as to the powers of appointment of the testator under the trusts of his marriage settlement, which was discovered among his papers.

The testator and his wife carried out the instructions, and the engrossment was in each case duly executed by each of them in the Hibernian Bank at Bray on February 25th, 1913, immediately prior to their joint departure for South Africa, for which they sailed on March 1st following, and from which they both subsequently returned.

The testator subsequently signed a document (No. 2) on January 26th, 1918, which was testamentary in form, but though entirely in his own handwriting, and signed by himself, was defective as a will, inasmuch as there were no witnesses to its execution. The testator subsequently, on the 18th March, 1919, prepared a further draft for a new will (document No. 3), which was not signed, and was manifestly incomplete.

Leech K.C., *Babington K.C.*, and *Hector Hughes*, for the plaintiff:—

The destruction of the will of February, 1913, was contemporaneous with, or subsequent to, the making of the defective testamentary writing of the 26th January, 1918. The destruction

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of the former was conditional on the latter being effective as a will. On the failure of the latter as a will, the doctrine of dependent relative revocation applied. The will of February, 1913, stands, therefore, unrevoked, and should be admitted to probate upon its contents being proved by production and authentication of the draft. [They referred to *In the Goods of Irvine* (1); *Irwin, deceased* (2); *Dancer* v. *Crabb* (3); *Dixon* v. *The Solicitor to the Treasury* (4).]

Serjeant Sullivan K.C., *Swayne K.C.*, and *Ernest Phelps*, for all the defendants except Major Cyril West:—

The doctrine of dependent relative revocation does not apply. There is writing under the testator's own hand stating that he destroyed the will of February, 1913, himself. This raises a presumption that he intended to, and did in fact, revoke that will. There is no evidence that this destruction and revocation did not take place long prior to the making of the defective will of the 26th January, 1918. The revocation is not conditional on the effectiveness of the latter document as a will. There is no evidence of any desire on the testator's part to make a will in substitution for that which he destroyed. He must therefore be taken to have died intestate.

J. H. S. Russell, for Major Cyril West.

Cur. adv. vult.

MOORE J.:—

I have set out my findings in this considered judgment so that the conclusions at which I have arrived may be more easily discussed should it be desired to have them reviewed.

I have no doubt as to the law applicable to cases of dependent relative revocation. I have derived much assistance from the able argument of Mr. Leech, and indeed I do not gather that the legal propositions laid down by him are disputed by Serjeant Sullivan or Mr. Swayne for three of the defendants, their real contention being that on the facts established such propositions

(1) [1919] 2 I. R. 485.
(2) 25 T. L. R. 41.
(3) 3 P. D. 98.
(4) [1905] Prob. 42.

do not apply. I do not go back to the older cases to which Mr. Leech has referred me, though I have consulted them, as they are amply borne out by the more recent ones, beginning with *Dancer* v. *Crabb* (1), *Dixon* v. *The Solicitor to the Treasury* (2), *Irwin, deceased* (3), and ending with *In the Goods of Irvine* (4), of which I may observe *Irwin, deceased* (3), seems particularly in point.

In the judgment of Mr. Justice Kenny in *Irvine's Case* (4), at p. 489, occurs the following passage (following the prior authorities), which I unreservedly adopt:—"If the act of revocation, whether by another will duly executed, or by the destruction of the existing will, be without reference to any other act or event, the revocation may be an absolute one; but if the act be so connected with some other act or event that its efficacy is meant to be dependent on that other act or event, it will fail as a revocation. If that other act be efficacious, the revocation will operate, otherwise it will not. It is altogether a question of intention." The intention in turn must be established as a matter of evidence, and it is my duty to see what the evidence is in the present case.

[His Lordship stated the facts, as set out above, and proceeded:—]

I infer from the above facts that it was prima facie not the testator's desire to die intestate. The first question of fact is: Is document No. 2 an imperfect will, or, as Serjeant Sullivan suggests, merely a draft? In form it is, as a testamentary document, perfectly regular, save for the execution, which fails for want of witnesses. It was found in a locked drawer in the testator's writing-desk, along with document No. 3, in an envelope marked "my last will, made January 26th, 1918."

I can only draw one inference from this: that it was intended on that date, in 1918, by the testator to be his last will. There is no proof, in spite of Serjeant Sullivan's ingenious suggestion, of the existence of any other document of that date of which this could be a copy or draft. The imperfect will contains a

(1) 3 P. D. 98.
(2) [1905] Prob. 42.
(3) 25 T. L. R. 41.
(4) [1919] 2 I. R. 485.

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bequest to his son, Aubrey Fenton West, of £2,000. Captain Aubrey Fenton West was examined before me, and gave evidence which I entirely accept: that while serving in Palestine in 1918 he had, in the end of March or beginning of April, 1918, received a letter from his father (not now forthcoming), in which he said that he, Captain West, would benefit materially by his will, and he, Captain West, understood it to mean that he had made a will by which he would benefit. No. 2 is the only document before me to which such letter can refer, and I therefore hold, in the circumstances, that document No. 2, in the testator's own pencilled writing and signed by him, was, in the foregoing circumstances, an original attempted will which failed only for want of due execution.

This attempted will purported to revoke all previous wills, and therefore, if valid, would have revoked the will of February 25th, 1913. The envelope containing the imperfect will had also a note on its face which was proved to be in the testator's handwriting: "One made February, 1913, destroyed."

That this will was, in fact, destroyed I have no doubt. Though search has been made through the testator's papers, it is not now forthcoming, and for myself I see no reason for disbelieving this memorandum by the testator. The question in the case is whether or not this destruction of the will of 1913 was dependent or conditional on the testator's belief that he had made a valid will in substitution for the old one. It would equally be a question, did the evidence warrant it, whether the destruction was brought about because he intended to make a new will?

Mr. Swayne is quite right when he lays stress on the fact that one of the difficulties in the present case, distinguishing it from the others referred to, is the fact that, save what may be gathered from the facts proved, there is no evidence of any express declaration by the testator of his desire to make a new will in substitution for the old one; and the question for me is: Is there sufficient evidence in the facts proved that he did so desire?

The first will contained a bequest to his then butler, William Boyce, of £500. There is evidence that the testator and his wife had often talked over the will, as husband and wife would do, and, though the lady in a very doubtful way inclines to think this may have been before the execution of the will, yet I believe from her

evidence that there was also conversation about it afterwards, to which the testator assented, all tending in the direction that the amount of the legacy was excessive. Prior to the drawing up of the imperfect will it appears that for some reason Boyce had left the testator's service; and I think it is safe to infer that the testator wished, probably in consequence of these conversations, to reduce the legacy, which he could only do by a fresh will or codicil. Secondly, the testator's son, Captain Aubrey West, who, with the other children, was not mentioned in the first will, was serving in Palestine; he was not mentioned in the earlier will, and from the testator's letter to him, already referred to, I am satisfied that the testator specially intended to benefit him, which again he could only do in a testamentary way by a new will or codicil. Thirdly, the charitable legacies amounted in 1913 to £300. In 1918, after three and a half years' war, with increase of expenditure and taxation, I think it quite probable that, like so many other persons similarly situated, the testator desired to reduce his charitable bequests, as he purported to do, by exactly 50 per cent., and this could not be done without a new will or codicil.

There may have been other reasons connected with the dropping out of the names of some of the other legatees, or the insertion of the names of others, but these I cannot deal with for want of evidence; but, taking the above three grounds for altering his will, I find that the testator had a desire for some alteration which led him to the attempt to carry them out in his imperfect will of 1918. In other words, it was reasonable and probable that he might desire to substitute these terms in the new will for the provisions of the old. The real question is, did he do so? Or, as suggested by Serjeant Sullivan, did he destroy the will of 1913 at some period antecedent to the making of the imperfect will with a desire for an intestacy, or, at any rate, without any intention of making such revocation conditional in his own mind on the substitution of a later disposition in its place? This is exactly the proposition with which the Court was confronted in argument in *Dixon's Case* (1); at p. 44 Gorell Barnes J. asks: "The point seems to be, what interval of time (if any)

(1) [1905] Prob. 42.

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between the act of physical destruction and the intention to execute a fresh document will debar the testator from having the benefit of the doctrine of dependent relative revocation?" Counsel, in reply, pointed out that the physical act of destruction, and the intention to execute a fresh will, were in that case simultaneous. This was also so in *Middleton's Case* (1), referred to by Mr. Leech in his excellent argument. In *Irwin's Case* (2) it was proved that the testatrix destroyed her will of 1901 at the time of making her imperfect will of 1907.

If therefore on the evidence, such as it is before me, I can legitimately arrive at the conclusion that the destruction of the will of 1913 was contemporaneous with or subsequent to the preparation of the imperfect will, I should then find a great preponderance of the facts pointing to the inference that the older will was only destroyed because the testator believed he had rendered it nugatory by the provisions of the later document. How, then, do matters on the evidence stand as regards this? There is no doubt that the will of 1913 was for some time contained in the envelope produced endorsed in ink in the testator's handwriting, "My last will, made Feb., 1913." To hold otherwise would be to falsify the testator's statement. The will is not now forthcoming; the envelope is. Putting myself in the testator's place, I reason in this way: the envelope with its endorsement, if the will were destroyed, say, in 1914, 1915, or 1916, as suggested by Mr. Swayne, would be absolutely useless. There would be no possible motive for preserving it until 1918 with a false description on its face. The most reasonable method in which, as a juror, I account for its preservation is to suppose that the testator kept it as a cover for the old will while it existed, and eventually took the old will out of it and converted the envelope to the only reasonable use to which it could there and then be put, namely, to contain the new one, which was found in it after his death; and that thereupon he rectified the endorsement probably by the same pencil with which he had drafted and signed the new one. This is not, perhaps, if it stood alone, sufficient to carry the plaintiff's case that the destruction was contemporaneous or subsequent to the making of the imperfect

(1) 3 Sw. & Tr., at p. 583. (2) 25 T. L. R. 41.

will the whole way, but it is consistent with what further appears on consideration of the two documents.

The first will opens with a revocatory clause, which, in this respect, is followed verbatim by the second. Then comes the bequest to William Boyce, already mentioned. This is also the case in the second document. Then in each succeeds a bequest to Charles Coster. The second will inserts a legacy to his wife's maid, and then exactly, as the old will does, gives a year's wages to each of his domestic servants who have been three years in his employment. By his second will he then adds the legacy, already mentioned, of £2,000 to his son; a bequest of £100 for repair of Kilbride Church; the National Hospital for Consumptives, £50, already mentioned in his first will at £300; legacies to his three nieces; then in both documents a residuary bequest to his wife: in the first will the appointment of his executrix, and in the second the appointment of the same executrix, and his solicitor as co-executor. Allowing therefore for necessary alterations, the frame and structure of the two documents, and the order of the various bequests, so far as they go to the same persons, are identical. Secondly, many of the clauses are verbatim the same, showing that in that respect the second is nearly a copy of the first. I have alluded to the revocatory clause, and without dwelling on the other verbal identities in the will, there are the residuary clauses, and, mutatis mutandis, the appointment of executors, and the attestation clause, except for the special addition in the older will. Thirdly, the use of words, not of art, which I find in each will, such as "pay days" and "pay day."

I think there is only one possible inference to be drawn from this similarity of frame-work and repetition, and that is that the draftsman of the imperfect will had the will of 1913 actually before him as a base when drawing up the document of 1918.

When drawn up from this will of 1913, he plainly utilized for containing the new will the existing envelope, and made the superscription on it correct by striking out with his pencil the words in ink, "Feb., 1913," and writing instead the words "Jany. 26, 1918," making the description of the contents read "my last will, made Jan. 26, 1918," which, as amended, would be correct.

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But as he only struck out in pencil the words "Feb., 1913," it must have occurred to him that those who came after him might naturally wish to know what had become of the will of that date, and to meet this inquiry he wrote, also in pencil, underneath, towards the left-hand corner, "one made Feb., 1913, destroyed." I draw the inference that it had been destroyed accordingly, after the document of 1918 had been drafted, and I so hold.

I have then the position that the testator, having at one time the two documents together in esse at the same moment, destroys one, the earlier, and places the later in the envelope previously containing the first, and amends the writing on the envelope to conform with the change in the circumstances. Can I, or should I, draw from this the further conclusion that the earlier one was thus destroyed because the testator (who, I have found, did not desire an intestacy) considered that he had revoked or cancelled it by the preparation of the later one? As against this, it is urged that the testator had previously executed two wills, and must be taken to have known that two witnesses were necessary, and that without them no will would be valid. It is true that he had executed one will in 1889, but it might well be that in an interval of nearly thirty years he had forgotten the requisites of valid execution. It is also true that he had executed the will of 1913 before two witnesses, but he did so under express instructions in writing (which were produced) from his solicitors.

I have no evidence that these were before him when he composed the document of 1918; in fact, I would assume they were not. It is true that to a certain extent he copied out the attestation clause into the imperfect will of 1918 from the will of 1913, and this is the strongest point as against the plaintiff's contention; but, on the other hand, he may have considered this, with a subsequent signature by witnesses, as a mere formality not affecting validity. As against this, the testator wrote to his son in March, 1918, saying in effect that he had made a will, and that the son would materially benefit thereby. He could not have written this had he imagined that he had made no valid will, and, on the whole probabilities of the case, I cannot see any reason why he should in the foregoing circumstances have destroyed the earlier will had he not believed that he had provided another equally

effective in its place. In my opinion, therefore, on the best judgment I can form, there is evidence on which I should hold that the revocation of the earlier will was conditional on the testator's belief that the revocatory clause in the later will would be effective; and, once it transpired that this belief was unfounded, the doctrine of dependent relative revocation applies, and the earlier will is set up, notwithstanding its revocation.

The contents of the destroyed will of 1913 have been sufficiently proved from the draft sworn to by Mr. Warren produced before me, and I accordingly think that probate should be granted of that will in the words of the draft so far as set out in the statement of claim. All parties will get their costs of this action, brought to solve a difficulty created by the testator himself, which I direct the executrix to pay, and to include in her own costs as against the estate.

Solicitors for the plaintiff: *Webb, Scott, & Seymour.*

Solicitor for Major Cyril West: *W. V. Seddall.*

Solicitors for the remaining defendants: *Montgomery & Chaytor.*

H. H.

Appeal. 1920.
Dec. 1.

IN THE MATTER OF THE WORKMEN'S COMPENSATION ACT, 1906. IN THE MATTER OF AN ARBITRATION BETWEEN NORA HANNAFIN, APPLICANT, AND FRANCIS FITZMAURICE, RESPONDENT (1).

Domestic servant—Accident—Arising out of and in the course of employment—Workmen's Compensation Act, 1906, *sect.* 1, *sub-s.* 1.

While a cook, in the course of her employment, was walking across the kitchen in her master's house, her slipper commenced to fall off, and, on stooping to re-adjust it, she fell and sustained injury. *Held* (Ronan L.J. *dubitante*), not to be an accident arising out of the employment.

This was an appeal by Francis Fitzmaurice against an award of the County Court Judge of the County of Cork, West Riding, dated the 8th October, 1920, by which he awarded compensation under the Workmen's Compensation Act, 1906, for personal injury caused to the applicant, as alleged, by accident arising out of and in the course of her employment as a domestic servant.

The applicant, who was the only witness examined, deposed as follows:—At the time of the accident I was a cook in the employment of the respondent. On the 26th September, 1919, I was going to the tap to get water to wash the towels for the house. I had been sitting reading at a table, and it was about 8.30 p.m. when I got up from the table to go to the tap. I had my slippers on when walking towards the tap. I found one of my slippers slipping off my foot, and I fell on my knees. I then tried to stand up, and I tried to put my foot into the slipper, but I found I was unable to do so. I then discovered that my thigh was hurt. I crawled on my knees to an arm-chair, and sat down. I stayed in the chair until morning. The doctor then came, and had me brought to the hospital. Mrs. Fitzmaurice was away from home, the parlourmaid had gone home, and Mr. Fitzmaurice was upstairs out of hearing.

Cross-examined:—After I fell I was unable to get up. It was on my knees I fell. I crawled back. When the slipper was

(1) In the Court of Appeal, before SIR J. CAMPBELL C., and RONAN and O'CONNOR L.JJ.

slipping off I tried to get it on again. I was stooping down to try to put it on when I fell on my knees.

The County Court Judge in his report stated as follows:—"The applicant at the time of the accident was a domestic servant of the respondent. At about 8.30 p.m., on September 26th, 1919, the applicant was reading at a table in her master's kitchen. It was part of her duty as such servant to wash towels in the kitchen for the use of the house, and she was entitled to wear slippers when doing her master's business. She was on her master's business when walking across the floor from the table to the tap. On the occasion in question, when so walking across the floor, one of the slippers commenced to fall off, and then she fell on her knees on the floor; the fact that the slipper commenced to fall off, and some slippery substance on the floor caused the applicant to fall on her knees. The fall on her knees caused the injury to the thigh, which is the injury complained of. I was of opinion that a domestic servant walking across her master's floor on her master's business took the risk of slipping on the floor, and that such risk was incidental to her employment. I find it was an accident arising out of and in the course of the employment. The figures were agreed upon, so I award to the applicant the sum of £43 5*s.* 0*d.*, and 3*s.* a week until further order."

H. D. Conner K.C. and *J. F. Bourke*, for the appellant:—

The accident did not arise out of and in the course of the employment. There is no evidence that the floor was in a slippery condition, or that the accident was caused by the applicant slipping on the floor. On the other hand, the evidence is explicit that it was caused by the slipper slipping off the woman's foot and her stooping to re-adjust it. That is a cause wholly independent of the employment. They referred to *Hutchison* v. *M'Kinnon* (1); *Thom* v. *Sinclair* (2); *Dennis* v. *A. J. White & Co.* (3); *Trim Joint District School Board of Management* v. *Kelly* (4); *Craske* v. *Wigan* (5); *Dennis* v. *Midland Railway Co.* (6); *Murphy* v. *Cooney* (7).

(1) [1916] A. C. 471.
(2) [1917] A. C. 127.
(3) [1917] A. C. 479.
(4) [1914] A. C. 667.
(5) [1909] 2 K. B. 635.
(6) [1920] 2 I. R. 154.
(7) [1914] 2 I. R. 76.

Appeal. 1900.

HANNAFIN v. FITZ-MAURICE.

Serjeant M'Sweeney K.C. and *J. M. FitzGerald*, for the respondent:—

The accident arose not only in the course of the employment, but out of the employment. The applicant was actually engaged in her employer's business, and on his premises. If an act of gross negligence, not amounting to misconduct, would not have disentitled her to compensation, how is she disentitled by reason of what occurred here? There is no evidence the slipper was defective, and no suggestion of misconduct. The case is governed by the decision of the House of Lords in *Armstrong, Whitworth, & Co.* v. *Redford* (1); *Aldridge* v. *Merry* (2); *Griffiths* v. *Robins* (3).

SIR JAMES CAMPBELL C.:—

We do not consider it necessary to reserve judgment in this case, as my colleague, Lord Justice O'Connor, and I are clearly of opinion that the judgment of the County Court Judge was wrong. The facts of the case are very simple. The applicant was engaged as a domestic servant in the house of the respondent. She had been sitting reading at a table in the kitchen at about 8.30 in the evening. She got up to go to the water-tap, presumably on the business of her employer, and then her account of what transpired is as follows:—"I had my slippers on when walking towards the tap. I found one of my slippers falling off my foot, and I fell on my knees." I pause there to say that on no reasonable inference to be drawn from the evidence was this fall due to a slippery floor; it was due to the slipper falling off her foot. She adds: "I then tried to stand up, and I tried to put my foot into the slipper, but I found I was unable to do so." In cross-examination she said: "It was on my knees I fell. I crawled back. When the slipper was slipping off, I tried to get it on again. I was stooping down to try to put it on when I fell on my knees"; and to the Judge she said: "It was after I had fallen, and when I tried to stand up again, that I tried to put my foot back again into my slipper." That is the entire case, and from this evidence it appears to me clear that the only possible inference of fact that can be drawn is

(1) [1920] A. C. 757. (2) [1913] 2 I. R. 308.
(3) [1917] Workmen's Comp. and Ins. Rep. 44.

that owing to the slipper being a misfit, or not being properly attached to her foot, or being improperly adjusted, it fell off her foot, and, in stooping to re-adjust it, she fell on her knees.

What does the County Court Judge say? "When so walking across the floor," i.e., towards the tap, "one of the slippers commenced to fall off." That is perfectly correct, and shows that the occurrence was due, not to some defect in the floor, but to something defective in the fastening of the slipper. "Then she fell on her knees on the floor; the fact that the slipper commenced to fall off, and some slippery substance on the floor caused the applicant to fall on her knees." This sentence is grammatically imperfect and incomplete, but whether it was intended as a statement of fact, or only as a probable inference, in neither case was there any evidence to support it. The Judge appends to his report the evidence of the applicant, who was the only witness called, and it does not contain one word as to this "slippery substance."

The question then comes back to this: In the conditions proved by the applicant herself, was this an accident arising out of her employment? If it did so arise, it is, in my judgment, impossible to avoid the conclusion that every domestic servant, so long as she is inside the house of her employer, is insured by her employer against any accident. That must necessarily follow if we are to hold the respondent liable in this case, where the accident has arisen, not from any risk occasioned by the condition of the premises, or by the work the woman was engaged in, but from a risk solely due, so far as the evidence goes, to the state of her own wearing apparel. If the employer is to be held liable for that, he is nothing short of an insurer; and no case has as yet gone to that length. Strong reliance has been placed by Serjeant M'Sweeney on the case of *Armstrong, Whitworth, & Co.* v. *Redford* (1). There the question involved was whether an accident to a young woman who, when returning from a canteen provided by her employers, in the business premises and connected by a flight of stone steps, slipped on the staircase and broke her ankle, arose out of and in the course of her employment. Each member of the House of Lords appears to have been of opinion that it arose out of the employment; and in view of

(1) [1920] A C. 757.

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the fact that the staircase was very slippery, as appears from the speeches in the House of Lords, it would, I think, have been surprising had it been decided otherwise; but what the House of Lords was divided upon was whether the accident arose in the circumstances of the case "in the course of" the employment, and as to this three members of the House decided in favour of the applicant, and two against. I do not think that case helps the applicant.

There is no suggestion of negligence or misconduct in the present case. The applicant was perfectly entitled to wear slippers: the pity is that she did not wear ones which fitted her. In my opinion the decision of the County Court Judge was wrong, and should be reversed.

RONAN L.J.:—

In this case I shall repeat the words I used in giving judgment in *Dennis* v. *Midland Railway Co.* (1): "I only desire to say that if my opinion could have had any practical result, I would have wished for an opportunity of more fully considering the authorities bearing on the question involved." It would, however, be a waste of public time were the case to stand for judgment, when my two colleagues have arrived at a clear conclusion.

In *Armstrong, Whitworth, & Co.* v. *Redford* (2), at p. 768, Lord Finlay said:—"It is very common, I believe, in large towns to have bedroom accommodation over the shops and other business premises for the use of the employees. Would the employer be liable for an accident which occurred to an employee by a fall whilst going upstairs or in his bedroom? Surely not. Such an accident would not be in the course of the employment, and does not arise out of it. It arises out of the provisions made for the welfare of the servant when off duty, which had nothing to do with the service itself."

But what of a case where, as here, an accident occurs to a servant when on duty, and while actually engaged in the service of the master, and doing an act which it was part of her duty to

(1) [1920] 2 I.R. 154, at p. 164. (2) [1920] A.C. 757.

do? Here there is no doubt that the servant was injured by accident in the course of her employment. She slipped and fell. The accident happened—1, because she was crossing the kitchen in performance of her duty; and 2, because she had a defective slipper. This was really the cause of the accident so far as the conduct of anyone was concerned. Suppose she had negligently allowed grease to fall on the floor and then slipped on it, would the case have been different?

Would the decision in the *Armstrong Case* (1) have been different if the staircase had not been slippery? If a man has a safe staircase in his house, and a servant coming downstairs in performance of her duty falls and sustains injury, can the master escape liability by showing that the accident was caused by her negligence and that he was not to blame, and that there was no evidence that the staircase was slippery or otherwise defective? This seems to me to be the main question in the present case.

If I had to decide the case, I should remit it to the County Court Judge to ascertain what ground there was for the statement in his judgment as to "some slippery substance on the floor," although counsel did not ask us to do so. I find it hard to believe that this was mere surmise on his part.

O'CONNOR L.J.:—

I agree with the judgment of the Lord Chancellor. As at present advised, I think that if a domestic servant, while engaged on his master's business, crosses the floor, and in doing so slips and falls, the accident might well be considered one arising out of his employment. That is not, however, the case with which we have to deal. The applicant was wearing a slipper—which she was entitled to do—and, owing to the slipper being ill-fitting, it came off, wholly or partly, while she was crossing the floor, and she fell and sustained injury. What caused the accident? It was not the floor, or anything else connected with or incident to the employment; it was the wearing by the applicant of a loose slipper.

Ronan L.J., in the course of his observations, has stated that there must have been some evidence in the case to warrant

(1) [1920] A. C. 757.

Appeal. 1920. HANAFIN v. FITZ-MAURICE. O'Connor L.J.

the County Court Judge in stating that there was some slippery substance on the floor, causing the applicant to fall on her knees; and also that he would have been disposed to have the case sent back to the County Court Judge, in order that he should be asked what was the foundation for this statement. That suggestion was not made by anyone during the argument. If counsel for the applicant had asked that this course should be taken, I should have been disposed to accede to it, and it occurred to me during the argument that it would have been a proper thing to do; but I hesitated to make the suggestion myself, and I take it that the reason why counsel did not make the application was that he did not consider that there was any foundation for the statement. The County Court Judge has purported to give the entire evidence in the case verbatim. That evidence contains no suggestion of any slippery substance on the floor; and I would be amazed if the Judge, in giving a verbatim report of the evidence, left out a vital point, and one which would have changed the entire aspect of the case. I think that the County Court Judge has drawn an inference of his own from the proven facts of the case, and, in my opinion, it was an inference which he was not entitled to draw.

For these reasons, and not without regret, I think that the application ought to be dismissed.

Solicitor for the applicant (respondent): *J. Travers Wolfe.*
Solicitor for the respondent (appellant): *James H. Powell.*

R. ST. J. C.

TIMOTHY CONNORS, AN INFANT, BY THOMAS CONNORS, HIS NEXT FRIEND, PLAINTIFF, *v.* EDWARD H. PEARSON, DEFENDANT.

K. B. Div. 1920. Feb. 4, 5, 21.

Appeal. May 3, 4. June 27.

JOHN M'LAUGHLIN, A MINOR, BY MICHAEL M'LAUGHLIN, HIS FATHER AND NEXT FRIEND, *v.* VICTOR HENRY SCOTT, D.I., R.I.C.

Police officer—Duty to prevent breach of the peace—Arrest and detention of innocent person—Apprehension of danger to—Justification.

Although it is the duty of a police officer to take all reasonable steps to prevent a breach of the peace, including, where the circumstances demand it, the arrest and detention of an innocent person, such arrest and detention is undertaken at the peril of the officer responsible; and it is no defence to an action for false imprisonment, at the instance of an innocent person so arrested and detained, that the officer bona fide believed him to be in danger at the hands of wrongdoers, and accordingly detained him for his own protection.

Per Gibson J.: Imprisonment of a possible witness quia timet to protect him without his consent from unknown malefactors is not within any common law principle of justification, and must be authorized, if at all, by statute.

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ACTION.

The plaintiff, Timothy Connors, an infant, sued, by his father as next friend, the defendant, who was the Commandant of the Royal Irish Constabulary Depot.

The statement of claim alleged that on the 14th February, 1919, the defendant wrongfully imprisoned the plaintiff at the depot, and there wrongfully detained him until the 9th April, 1919.

The defendant, by his defence, traversed the acts complained of, and alternatively alleged that the plaintiff, by reason of his actions in aid of the administration of justice, was in grave danger of life and limb from the members of a criminal organization, whose activities were widespread throughout the country, and that it was necessary for the protection of the plaintiff that he

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should be detained in a safe place and guarded; and the acts complained of were done by the defendant, if at all, in the discharge of his duty as a peace officer for the prevention of criminal attacks upon the plaintiff. Upon these pleadings issue was joined. The plaintiff also submitted that the special defence was not good in law.

The action was tried before the Right Hon. Mr. Justice Pim and a special jury, on the 18th and 19th December, 1919, and the following summary of the evidence is taken from the learned Judge's report of the trial of the action :—

The plaintiff lives near Greenore, in the County of Tipperary, close to Soloheadbeg, at which latter place two policemen, who were protecting a cart which was under the control of the County Council of Tipperary, and which contained explosives about to be used for the purpose of blasting, were murdered. The boy had, as will be seen from the evidence, given some information to the police. He was taken by District Inspector Neylan, and brought to the barracks in Tipperary for the purpose of getting a complete statement from him. He was kept there for four days, and then sent up to the Constabulary Depot in the Phœnix Park, where he was kept for about two months. The defendant was and is the Commandant of the said depot. Early in April, 1919, an application was made to the King's Bench Division by the boy's father for a writ of habeas corpus directed to the defendant, requiring him to produce the body of the boy in Court on a day named. On the day on which the said application came before the Court the defendant released the said boy, and sent him back to his father. He made an affidavit, informing the Court of what he had done, and his reasons therefor.

The evidence was as follows :—

Timothy Connors, the plaintiff :—I am twelve years old. My father is Thomas Connors, who lives near Greenane, in the County of Tipperary. I was living with him and my mother in February last. Early in February—I do not know the date, but it was on a Monday—I had been at the National School. When I came out I saw a motor car upon the road. I was with a number of other children. I was going home. I saw two motor cars and a covered

military conveyance. We walked on towards the cars. Four policemen hopped out of the ditch, and told me to stand. They asked me my name. I gave it. They then asked me did I know who killed the two policemen. I said I did not. They then put me into the motor car, and drove me off to Tipperary Barracks. There were soldiers with the motor cars. They had guns and bayonets with them. I do not know how many soldiers there were. Three policemen and a soldier were in the car with me. It drove off first. District Inspector Neylan was one of the police. When the police hopped out of the ditch, one of the children ran away. The rest stayed there. There were three boys, and the rest were girls. I was kept in Tipperary Barracks from Monday until Friday. Before I was arrested I had never spoken to the police about the murders. On Friday, the 14th February, 1919, I was put into a motor car, and a coat was put on me. I was taken to the Limerick Junction. District Inspector Neylan and two other policemen were with me. I was brought into the station and put into a train, and was taken to Dublin. The same three policemen went with me to Dublin. At Dublin we got into a motor car, and were taken to the depot at Phœnix Park. I was kept there for a long time. While I was there I saw the District Inspector four or five times during the early part of the time I was there. He used to speak to me. A policeman was always with me day and night. I am a Catholic. I was not at Mass while I was in the depot, nor did I see a priest, and I heard nothing from my father or mother. I never spoke to anyone except the police. I was brought to the Castle about six times. I have shown Mr. Woods, solicitor, the door at which I entered. A man used to ask me questions about Soloheadbeg. I recollect being taken away from the depot. Sergeant Faughan took me home to my father's house. We walked to the Kingsbridge. He was in plain clothes.

Cross-examined.—I recollect hearing about the murder of the policemen on the evening it happened. They talked about it at home. My father and mother, my brother John and my sister were all talking about it. John is older than I am. They talked of all that happened at the time of the murders and after. The police were kind to me. I was not afraid at all. I spoke

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to them before they took me. My sister came up at the time, and told me to go home; not to speak to them, but to go home. My father then came up. He had a horse with him. He said nothing to me. My father said nothing, and did nothing, when the police ordered me into the motor car. I made no objection, and my father made no objection. The police treated me kindly. Sergeant Faughan was with me the whole time. He was very kind to me. I was happy with Sergeant Faughan. He used to go to the Castle with me. I answered all the questions put.

[The witness was here asked whether a woman had come to see him during his detention in the depot, who called herself his aunt. He remained silent, and no answer could be got from him to the question; but he said, in reply to a question put to him by counsel for the defendant, that the woman had not spoken about the murders, and had not threatened him.]

In answer to Mr. Healy, who re-examined him, he said: Faughan was not with him at the time at all. [That is, when the woman called.] I was at the Castle six or seven times. Statements were taken from me, which I signed. Two in all. When I was taken by the police, my father was driving a cart with a load of coal.

Johanna Connors.—I reside with my husband at Greenane. He is a labourer. I heard of the arrest of my son on the evening of the 10th February. The children told me about it. My husband and I went that evening to the barracks in Tipperary, and we asked about the boy. It was about 8 o'clock. We were kept there about two hours. I did not know the police. We got no information. We left the barracks at 10 o'clock, about. On Saturday morning we went again. We had heard nothing up to that time. On Saturday they told me that the child was in the possession of the police. He was brought home on the 9th April, 1919, at 8 o'clock in the evening. It was getting dark. The boy said that the man with him was Sergeant Faughan. He was in plain clothes. He said to me that the boy was a fine boy, and that he had given him new clothes, and had been kind to him. He said that the washing was at the laundry, but that it would be sent to me as soon as it came back.

We never got it. Since then the boy has had fair health, but has been subject to nervous fits. At night he gets fits, and falls unconscious. He screams in his sleep, and wakens up in a frightened state, with perspiration rolling off him. He sometimes gets it twice a week, and he then talks about the police. It is only at night he gets these fits. He won't go out alone. When he got back throngs came to see him. No one ever thought they would see him alive.

Cross-examined.—I never heard of a threat being made against anyone who communicated with the police. No one ever spoke to me about the danger of speaking to the police. I never heard of the proclamation. She was then asked whether she did not know the people were afraid to speak to the police. [Mr. Healy objected. I admitted the question.] She said she did not know it. I heard of the murder the night it took place. Soloheadbeg is only half a mile from us. I heard nothing except that it took place convenient to the quarry. The plaintiff was not present when I was informed. I have another son. My daughter never told me that the plaintiff had been speaking to the police about Soloheadbeg.

Thomas Connors.—I am a labourer. I have two sons, John and Tim. I was carting coal on the 10th February. As I came up I saw the two motors, and the police, and some children. There were sixty or eighty soldiers with fixed bayonets. I was told to halt by a policeman. I had seen Tim with the police, crying. The police asked me for a statement. I refused. I was searched, and then I went home. I had no conversation about the boy, but the District Inspector said he was taking him to Tipperary, and that he would be all right. I asked him what he wanted him for. He said again that he would be all right. I had no chance of speaking to the boy. I was about fifteen yards away from the boy when I pulled up. I was there by accident. I went with my wife to the barrack in Tipperary that evening. We waited two hours, and got no information. On Saturday we went again. They told me that the boy was in charge of the police. I heard nothing of him until his return in April. On the 4th March I wrote to the Lord Lieutenant, and I received an answer dated the 5th. [Serjeant Sullivan objected to my receiving the reply. I

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allowed it.] John was arrested the week after, and kept about seventeen days.

Cross-examined.—When the police interrogated me, I refused to answer their questions, saying that I had given a statement before. I had told them on the first occasion they came to me that I did not know who killed the police. I did not say the boy had no information to give them. I had not spoken to the boy. I had no conversation with John before he was taken, nor did I tell him that he must not answer questions. [He was then asked whether he knew who had instructed and paid his solicitors. Mr. Healy objected. I allowed the question. The answer was, "I don't know."]

This closed the plaintiff's case. Serjeant Sullivan then asked me for a direction on the ground that no evidence to bring the defendant into communication with the boy, or that the defendant had personally intervened in respect of the boy, had been produced. I refused the direction, on the ground that the defendant was the commandant of the depot in which the boy was detained; that it was he who had sent the boy home on the 9th April, and who had made the affidavit for the Court when the application for the habeas corpus was made.

Serjeant Sullivan stated the case for the defendant.

The evidence for the defence was as follows:—

District Inspector Thomas Neylan.—I was on duty in Tipperary in February, 1919, investigating the murders at Soloheadbeg. [He was then asked whether the road from Soloheadbeg to Alene passed the National School of Greenane. Mr. Healy objected to the question, on the ground that the Crown were bound by the particulars given on the 6th of November. I allowed the question, inasmuch as the answer to it might have a direct bearing on the knowledge the boy had. The District Inspector answered "yes."] The murder was committed at 12.45, during school hours. On the 10th of February I made inquiries in the vicinity of the school-house. I met some of the children coming from school, amongst them the plaintiff. I questioned him. He made a statement to me. His sister approached, and called the boy away. She is about 17 years of age. I went on

questioning him. It was a statement about the murders. His father approached. He had a horse and cart. He told the boy to go home. I said I was questioning him, and had not done with him. He said the boy had nothing to tell me. That was not true. I questioned him further. The father insisted on taking the boy away. I said if he refused to allow me to go on I would have to put him (the father) under arrest. The boy refused to tell me anything more while the father was there. I then told his father I would have to take the boy to the barracks to get a complete statement. I took him away by motor. That evening he made a statement; Sergeant Faughan was in charge of him. I have experience of the district. I found a copy of the proclamation, which I now produce. It is dated the 15th March. [This was objected to by Mr. Healy, but I admitted it as showing the condition of the county.] In my opinion the plaintiff's life would have been in danger if he had been left where he was. [This was also objected to by Mr. Healy, and allowed by me.] No one has been made amenable to justice.

Cross-examined.—I went to Tipperary on the 1st February. I was a stranger up to that. I left the district after six or eight months. Williamson is there now as District Inspector. I was at that time assisting Mr. Brownrigg. I took the boy to the barracks as a result of what happened on the public road. He was afraid of his father. I took him to get him away from his father's influence. Having regard to the statement he made, I would not have taken the responsibility of sending him back. I told the father that I was taking the boy to the barracks, and that he would be well with me. I would not have taken the responsibility of letting him away on account of the statement he had made, and the condition of the county. All the parties he named have absconded. The military present numbered, perhaps, twenty or more, and the police ten.

Re-examined.—I think the danger to the boy ceased when the habeas corpus application was made. There was then, in my opinion, an agreement entered into between Connors and the people interested in the murders.

Constable Martin Rowse.—On the 2nd February, 1919, I attended at Rosegreen Roman Catholic church. I posted up a copy

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of a proclamation announcing that a reward of £1,000 would be given for information as to the murders. After Mass I found that the proclamation had been removed, and the following put in its place:—"Any person found giving information about the shooting of the peelers will meet the same fate as the peelers. Signed, Veritas." [This proclamation was put in evidence.]

Cross-examined.—I did not question anyone, nor was I present when anyone was questioned.

Sergeant Mathew Horgan.—I have been stationed in Tipperary town since last January. I saw similar documents to the one in my hand posted in the town. [Mr. Healy objected, and I ruled it out, as it bore date August, 1919.]

William Henry Langhorne.—I was acting as County Inspector of the County of Tipperary. There was a great deal of unrest in the county in January, but no overt crime except frequent raids for arms and drilling. I was under a great deal of apprehension as to the peace and order of the county. The proclamation was posted on the 10th, but no one has been brought to justice. [Objection was made by Mr. Healy to all this evidence. I admitted it.] In my opinion any person giving evidence or suspected of giving evidence would be in great danger of his life.

Cross-examined.—I have been in Tipperary since 1910. I gave no directions for the arrest of the boy, nor did I know anything about it. I became aware that the alleged murderers had absconded. A complete search was effected. We were as active as we could be, but found nothing. The Assistant Inspector-General was down. It was not by my direction that the boy was taken to Dublin. I cannot say who gave the directions. I heard that the directions had been given. It was not reported to me that the boy had been taken.

District-Inspector Neylan was recalled by me. He said: I had not seen the boy before the 10th of February, and I had no reason to think he knew anything. I spoke to him by chance. After I had him with me in Tipperary Barracks I got instructions from headquarters what to do.

The defendant was not put in the witness-box. Serjeant Sullivan renewed his application for a direction on similar

grounds as before. I refused. He further asked me for a direction on the count for conspiracy, on the ground that there was no evidence of any conspiracy. I granted this application, and so directed the jury.

Serjeant Sullivan then asked me to put the following questions to the jury: (*a*) Was the detention of the plaintiff reasonably necessary for the protection of plaintiff against a felonious breach of the peace directed against him? (*b*) Was the detention of the plaintiff reasonably necessary to enable the plaintiff's evidence to be available in proceedings to be taken against the Soloheadbeg murderers? I refused, preferring my own form of the first question, and stating that, if necessary, I was prepared to rule on the second question that an affirmative finding would be no answer in law to the action.

Mr. Healy then asked me for a direction, on the ground that there was no evidence as to the state of the defendant's mind in causing and procuring and prolonging the detention of the plaintiff. I told him that I would let the questions which I had framed go to the jury. I was quite aware of the force of Mr. Healy's requisition, in view of the fact that the defendant did not appear. Mr. Healy also asked me to put the following question to the jury: "Did the defendant detain and keep the plaintiff in the R.I.C. Depot, Phœnix Park?" I refused, as the question was implicit in the questions put. I then charged the jury, and after they had retired, Serjeant Sullivan made the following objections to my charge: "I respectfully object to the following passage in your Lordship's charge:—'You must begin the case with the assumption that, if a wrong had been done, the defendant Mr. Pearson is responsible. Defendant must be held responsible from the beginning for what has been done. If he was taken and detained, it was Mr. Pearson who took and detained him' [I think I said 'you must assume that it was Mr. Pearson who took and detained him']. I submit that while according to your Lordship's ruling there is evidence of detention by defendant, nevertheless it is open to the jury to find that the defendant did not detain him."

I refused to recall the jury. The substance of what Serjeant Sullivan complained of in my charge is correct, but the statements

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only amounted to an explanation to the jury of the position in view of the fact that the defendant had not appeared. Either the defendant must be held responsible for taking or for detention, or I should have directed the jury to find for the defendant. I so told the jury, and they completely understood it. It was on the jury's suggestion that I split the second and third questions each into two limbs.

The following questions were submitted to the jury and answered as hereinafter mentioned: 1st. Did the defendant cause the plaintiff to be taken and detained? Answer, "yes." 2nd. Did the defendant take the plaintiff (*a*) genuinely believing that his life was in danger, and in order to protect his life? No answer; or (*b*) for the purpose of interrogating him? Answer, "yes." 3rd. Did the defendant detain the plaintiff (*a*) genuinely believing that his life was in danger and in order to protect his life? No answer; or (*b*) for the purpose of interrogating him? No answer. 4th. Did the defendant conspire with others to take and detain the plaintiff with the intent to injure him? Answer, "no." 5th. Assess damages. Answer, £75.

The Judge abstained from giving judgment for either party, and left the parties respectively to move the King's Bench Division for such judgment or judgments as they might be respectively advised, and directed that if both parties should serve notices of motion for judgment both notices should be heard together.

The defendant applied to the King's Bench Division (1) that the verdict and finding of the jury be set aside, and that judgment in the action be entered for him on the grounds that there was no evidence adduced at the hearing that the defendant detained the plaintiff, as alleged, at all, and that the learned Judge should have directed a verdict for the defendant; and that he misdirected the jury in holding that there was any evidence proper to be submitted to the jury as against the defendant; or, in the alternative, that a new trial should be ordered upon the grounds of misdirection and non-direction, as in the requisition and dominical of counsel set forth.

(1) In the King's Bench Division, before MOLONY C.J., and GIBSON and GORDON JJ.

The plaintiff moved to have judgment entered for him.

Healy K.C., *Wood K.C.*, and *Bewley*, for the plaintiff.

Serjeant Sullivan K.C., *Wylie K.C.*, and *Holmes*, for the defendant.

The arguments were similar to those in the Court of Appeal. The authorities cited are referred to in the judgments.

Cur. adv. vult.

MOLONY C.J.:—

The plaintiff, Timothy Connors, is an infant, and sues by his father as next friend, and the defendant is the Commandant of the Royal Irish Constabulary Depot. The statement of claim alleges that on the 14th of February, 1919, the defendant wrongfully imprisoned the plaintiff at the depot, and there wrongfully detained him till the 9th of April, 1919. The defendant in his defence traverses the acts complained of, and alternatively alleges that the plaintiff, by reason of his actions in aid of the administration of justice, was in grave danger of life and limb from the members of a criminal organization whose activities were widespread throughout the country, and that it was necessary for the protection of the plaintiff that he should be detained in a safe place and guarded, and the acts complained of were done by the defendant, if at all, in the discharge of his duty as a peace officer for the prevention of criminal attacks upon the plaintiff. Upon these pleadings issue was joined, and the plaintiff also submitted that the special defence was not good in law.

The facts of the case are few and simple. The plaintiff lives at Greenane, in the County of Tipperary, close to Soloheadbeg, and attends the local National School. At Soloheadbeg two policemen who were guarding a cart containing explosives were murdered, and on the 10th of February, while District Inspector Neylan was pursuing inquiries in reference to the crime, he met some children, including the plaintiff, coming from the school, and proceeded to question them. The plaintiff made a statement to the District Inspector, but before he had completed it his sister approached and called him away, and afterwards his father came,

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and told the boy to go home. As the boy refused to tell the District Inspector anything more while the father was there, the District Inspector told the father that he would have to take the boy to the barrack to get a complete statement, and he accordingly took the boy by motor to the barrack, where he was detained until the 14th of February, when he was transferred to the depot at Dublin, accompanied by Sergeant Faughan, and he was kept there until the 9th of April, 1919. He was undoubtedly detained against his will; but, as the boy himself stated, the police, and particularly Sergeant Faughan, who accompanied the boy to the depot and remained with him the whole time, treated him kindly.

At the close of the plaintiff's case, Serjeant Sullivan asked for a direction on the ground that there was no evidence to bring the plaintiff into communication with the boy, or that the defendant had personally intervened in respect to the boy. Mr. Justice Pim refused the application, and, in my opinion, he was quite right in doing so. It is quite true that the boy had no personal communication of any kind with the defendant; but the boy was detained for two months in the depot by the police, who were under the control of the Commandant (see 22 & 23 Vict. c. 22, s. 4), and his affidavit, which was sworn on the 10th April, 1919, shows that the defendant was fully aware that the boy had been at the depot, as he describes it, "for some time past," and had left the depot for home the previous day. Having regard to the position of the defendant, the letter which was written to him by the plaintiff's solicitor on 12th May, 1919, and his reply to the statements in his affidavit, there was, in my opinion, ample and indeed coercive evidence that the defendant was answerable in law for the detention of the boy.

It is the manifest duty of this Court to see that the liberty of the subject shall not be restrained unless under the process of law, and where the jury has found that the defendant caused the plaintiff to be taken and detained, the onus of proving that he had legal justification for the act lies upon the defendant. The defendant was not examined himself, but witnesses were produced on his behalf for the purpose of justifying his action. District Inspector Neylan deposed to the circumstances in which he removed the boy to the barrack and afterwards sent him to

the depot, and he stated that in his opinion the plaintiff's life would have been in danger if he had been left where he was; but in cross-examination he said that he took the boy to get him away from his father's influence, and that, having regard to the statement which the boy had made, he would not have taken the responsibility of sending him back. It was said that the boy had made a statement, which was not, however, produced or given in evidence, implicating certain persons who have since absconded.

County Inspector Langhorne stated that in his opinion any person giving evidence or suspected of giving evidence would be in great danger of his life, but he also said that, while there was a good deal of unrest in the county in January, there was no overt crime, except frequent raids for arms and drilling.

Evidence was also given by Constable Rowse, to the effect that on the 2nd February, 1919, he posted at Rosegreen Roman Catholic church a copy of a proclamation offering a reward of £1,000 for information as to the murders, and that after Mass he found that the proclamation had been removed and another one substituted in its place, to the effect that any person found giving information about the shooting of the peelers would meet the same fate as the peelers. This evidence was produced on the part of the defendant with the object of showing that there was a considerable amount of unrest in the county, and that the plaintiff's life would, or, at least might, have been in danger if he had returned to his own home immediately after he had made the statement to the police, which was known or suspected to implicate certain persons. The jury were unable to answer the question put to them, as to whether the defendant detained the plaintiff, genuinely believing that his life was in danger, and in order to protect his life; but I am of opinion that even if the jury answered this question in the affirmative, it would not amount in law to a justification of the defendant's action. It would certainly seriously imperil the liberty of His Majesty's subjects if, on every occasion that a police officer thought that the life of a witness would be in danger if he returned to his own home, he were at liberty to arrest and detain him for such period as he considered necessary. Mr. Serjeant Sullivan, however, asserted this proposition, and said that the subject is protected by reason of

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the right which he has of ultimately submitting his case to a jury and of obtaining their opinion as to the reasonableness of the police officer's conduct. There is no foundation in law for such a proposition. Police officers have certain rights given to them, and duties imposed upon them, in regard to the preservation of the peace, and they may be justified in temporarily restraining the action of an individual in order to avert a menace to the public peace; but this is a power which is confined to cases where it is manifest that a breach of the peace is imminent, and can be averted in no other way except by restraining the action of the individual.

The first case of importance in which this principle was established was *Humphreys* v. *Connor* (1). In that case the plaintiff brought an action for assault, and the defendant pleaded that he was Sub-Inspector of Constabulary, and that the plaintiff was walking through the street of the town of Swanlinbar in open day, at about 12 o'clock noon, wearing a party emblem, namely, an orange lily, the wearing whereof was calculated to provoke animosity; and on the refusal of the plaintiff to remove the said emblem, the defendant "as such sub-inspector, in order to preserve the public peace, which was likely to be broken in consequence of the said conduct of the plaintiff, and to protect the plaintiff from the said threatened violence, and which violence the said several persons who were provoked by the conduct of the plaintiff in consequence of the said conduct were likely to inflict upon the said plaintiff, and in order to restore order and tranquillity in said town, then gently and quietly and necessarily and unavoidably removed the said emblem from the plaintiff." The plaintiff demurred to this defence, but the King's Bench overruled the demurrer and held that the defence was good. This case shows that a constable, who is charged with the solemn duty of seeing that the peace is preserved, may remove from an individual what he sees to be a provocation to a breach of the peace; but there is no analogy between what must be done in order to prevent a breach of the peace then imminent and the forcible detention of a person for over two months, because the person who detains him believes that his life may be in danger if he sets him at liberty.

(1) 17 I. C. L. R. 1.

The case of *O'Kelly* v. *Harvey* (1), which was also relied upon by the defendant, does not in any way support the defendant's case. That was an action for assault, brought by Mr. O'Kelly, a Member of Parliament, against the defendant, who was a magistrate, the assault being alleged to have been committed in removing the plaintiff when he was engaged in holding a lawful meeting. The defendant alleged that the assault was justified, because he believed, and had reasonable grounds for believing, that a breach of the peace would occur if the meeting being held by the plaintiff was allowed to continue, and that public peace and tranquillity could not otherwise be preserved than by separating and dispersing the plaintiff and the others so assembled; and that the people having neglected to disperse after having been requested to do so, the defendant laid his hand upon the plaintiff, using no more force than what was necessary, for the purpose of dispersing the plaintiff and the others so assembled. In the Court of Appeal the defence was held good, on the ground that the act complained of was necessary, in order that the defendant should perform his paramount duty to preserve the peace unbroken. Law C. in that case thus stated the obligations of the defendant: "The question then seems to be reduced to this: assuming the plaintiff and others assembled with him to be doing nothing unlawful, but yet that there were reasonable grounds for the defendant believing, as he did, that there would be a breach of the peace if they continued so assembled, and that there was no other way in which the breach of the peace could be avoided but by stopping and dispersing the plaintiff's meeting, was the defendant justified in taking the necessary steps to stop and disperse it? In my opinion he was so justified under the peculiar circumstances stated in the defence, and which for the present must be taken as admitted to be there truly stated. Under the circumstances, the defendant was not to defer action until the breach of the peace had actually been committed. His paramount duty was to preserve the peace unbroken, and that by whatever means were available for the purpose. Further, the duty of a Justice of the Peace being to preserve the peace unbroken, he is of course entitled, and in fact bound, to intervene

(1) 10 L. R. Ir. 285; 14 L. R. Ir. 105.

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the moment he has a reasonable apprehension of a breach of the peace being imminent, and therefore he must in such cases necessarily act on his own reasonable and bona fide belief as to what is likely to occur. Accordingly, in the present case, even assuming that the danger to the public peace arose altogether from the threatened attack of another body on the plaintiff and his friends, still if the defendant believed, and had just grounds for the belief, that the peace could only be preserved by withdrawing the plaintiff and his friends from the attack with which they were threatened, it was, I think, the duty of the defendant to take that course."

To the same effect is the decision of this Court and of the Court of Appeal in *Coyne* v. *Tweedy* (1). These cases require only to be stated to show how essentially different they are from the present. They proceed upon the principle that a police officer or a magistrate, whose obligations are similar to those of a peace officer, may, in the presence of imminent danger, commit what would otherwise be an assault in order to prevent a breach of the peace; but there is absolutely no authority for the proposition that if a peace officer believes that a person's life would be in danger if he returned to his own home, the officer is entitled to detain the person by force for such a period, however long, as he may consider necessary.

Mr. Serjeant Sullivan, realizing the force of these cases, asked the learned Judge at the trial to put the following question to the jury:—Was the detention of the plaintiff necessary for the protection of the plaintiff against a felonious breach of the peace directed against him? The learned Judge refused to put the question, and, in my opinion, rightly, because there was no evidence whatever that there was any felonious breach of the peace contemplated against the plaintiff which would justify his compulsory detention. Serjeant Sullivan asked that the further question should be put to the jury:—Was the detention of the plaintiff reasonably necessary to enable the plaintiff's evidence to be available in proceedings to be taken against the Soloheadbeg murderers? But he admitted at the hearing before us that even if such a question were put and answered in the affirmative, it would not be a justification in law of the defendant's action.

(1) [1898] 2 I. R. 167.

In my opinion there was no justification in law for the detention of the plaintiff, and, as the defendant is responsible for such detention, judgment must be entered for the plaintiff for the sum of £75, together with the costs of the trial and of this motion.

GIBSON J. :—

This action for detention amounting to false imprisonment raises novel questions, and it is to be regretted that the Crown did not have a shorthand note as in *Coll's Case* (1), and the numerous reports in the State Trial Reports where less serious issues were involved. The defendant's attempted justification is without legal precedent hitherto, and though our common law, as a living force, must be applied to the changing conditions of society, such development must be in accordance with settled principles; mischiefs which it cannot meet must be dealt with by legislation.

The argument has been directed to three points:—

1. Was the defence of justification pleaded valid, and was there evidence to support it?

2. Was there evidence of detention as regards the defendant?

3. Was there misdirection as to defendant's responsibility and as to damages? The two latter matters are of minor moment.

1. Crown counsel urged that where it was necessary for personal protection against apprehended future unlawful violence, constituting a breach of the peace, the peace officer could take or detain the person in peril for such time as would be required for his safety, and that the necessity of the preventive detention and its reasonable period of continuance were to be determined by the jury in each particular case. The two cases relied on—decided on demurrer, admitting the truth of the defence in fact—as supporting in principle the defendant's contention have been already sufficiently discussed by my Lord. In *O'Kelly* v. *Harvey* (2) the demurrer was allowed to the 11th and 12th paragraphs of the defence, which, though averring reasonable and probable grounds for belief, did not aver that the meeting was in fact unlawful. The conspiracy alleged was, in the opinion of the Lord Chief Baron (3), illegal, and a meeting to promote it would have been an unlawful assembly. The 13th

(1) 24 L. R. Ir. 522. (2) 10 L. R. Ir. 285; 14 L. R. Ir. 105.
(3) See 10 L. R. Ir., at p. 291.

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paragraph, which sets out the grounds on which the necessity of the defendant justice's action in order to preserve peace unbroken proceeded, was held good. The Court of Appeal affirmed the decision below. The 13th paragraph did not aver, as the 11th and 12th paragraphs did, that the meeting was in pursuance of an illegal conspiracy; the Court held that, assuming that the meeting was not for an unlawful purpose, still necessity justifying the defendant was disclosed. That an assemblage for the purpose of carrying into effect a criminal conspiracy is an unlawful assembly and indictable breach of the peace was not questioned, and was acted on by the Chief Baron in Crimes Act cases. It was so held in *Rawlins* v. *Ellis* (1). The decision in *O'Kelly* v. *Harvey* (2) was applied in *Coyne* v. *Tweedy* (3), where the plaintiff, assumed to be lawfully in possession of the chapel, was turned out by the police officer, in whose presence the rival clergyman, Father Conroy, had effected a forcible entrance. The above cases establish that where a breach of the peace is imminent, and can only be avoided by separating the probable combatants, a peace officer is justified by the existing necessity in doing what is required to avert the collision, though one of the parties may not be the aggressor, and may be innocent of any antecedent provocative misconduct.

The following points of distinction between these authorities and the present case are obvious:—1. The actions were for assault, which differ widely from actions for imprisonment: *Harvey* v. *Mayne* (4). 2. In *Humphries* v. *Connor* (5) and *O'Kelly* v. *Harvey* (2), the facts showing necessity of intervention were specially pleaded so as to enable the Court to judge. 3. No question arose as to the imprisonment of an innocent person without his consent in order to protect him against future breaches of the peace likely to be committed against him.

The present case lies entirely outside the above authorities, and the defence is insufficient in law. Not only does it omit to plead special facts, but it also does not show why forcible detention in Dublin in lieu of police protection was necessary, or whether the

(1) 16 M. & W. 172.
(2) 10 L. R. Ir. 285; 14 L. R. Ir. 105.
(3) [1898] 2 I. R. 167.
(4) I. R. 6 C. L. 417.
(5) 17 I. C. L. R. 1.

period of detention was reasonable. In the Crimes Act of 1887 (1), sect. 1, the power of preliminary inquiry, on the model of Scotch precognition, is guarded by express conditions; but there is no provision that the person or child interrogated should be interned, though the danger to him, if incriminating evidence was given, would be apparently much greater than here.

Apart altogether from pleading form, the evidence fails to support any defence on this supposed principle of necessity. The first interview with the boy was casual. What he then said, or his subsequent statements to the police, we do not know; there was probably something tending to incriminate the persons alleged to have absconded. The plaintiff was living at home with his father, and any danger to him would have arisen from his adhering to his supposed story. He was taken away to remove him from the influence of his parent, of whom he was afraid, and who was not in sympathy with the efforts of the police. The reason for his removal is based, not on objective facts establishing actual and immediate peril, but on the opinion of the local police as to prospective danger, which opinion, however reasonable, is not, as mere belief, a justification in law, as appears from the successful demurrers in *O'Kelly* v. *Harvey* (2). Headquarters had no evidence besides that disclosed at the trial. The detention of the boy in Tipperary was the act of the local officers. His removal to Dublin does not represent their decision as to the form of protection necessary. Thus the necessity of the primary detention in Tipperary rests on belief of the police officers there; the form of protection, by confining the plaintiff in Dublin, represents a headquarters' opinion, the exact grounds of which are left to conjecture. The change of local conditions enabling the plaintiff to return to his home safely, and the date of such change, are left uncertain. *Entick* v. *Carrington* (3) is instructive on the whole position. If belief that a person intends to commit a crime, unsupported by overt acts of attempt, is insufficient to justify his arrest, how can such belief justify confinement of the person, the object of the supposed future illegal act?

(1) 50 & 51 Vict. c. 20. (2) 10 L. R. Ir. 285; 14 L. R. Ir. 105.
(3) 19 Howell, St. Trials, 1067.

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Being of opinion that if the defendant had custody of the plaintiff he is without defence, I now proceed to consider was there evidence to establish such custody. The defendant was an Assistant Inspector-General and Commandant, that is, governor of the depot. He is said not to have been the Assistant Inspector-General who visited Tipperary before the plaintiff's removal. The duties of the Commandant as to control of the establishment were not proved. The defendant was not examined. The circumstances in which the plaintiff was brought to the depot are not disclosed. One would suppose that the plaintiff would not have been taken in as an inmate, and kept in strict confinement in the manner described, without some written authority or entry in the books. Sergeant Faughan, who accompanied him, was not called to prove the order on which he acted, or what occurred on arrival when the plaintiff was handed over.

Looking at the letter of the 12th May from plaintiff's solicitor, answered a week after, on the 20th, and the defendant's affidavit on the habeas corpus application, the defendant's official position as Commandant and Assistant Inspector-General, and the exceptional circumstances in which the plaintiff was confined in the Constabulary depot, there was evidence, in my opinion, of the defendant's responsibility as custodian. The situation called for explanation from the Commandant, whose description as such suggests control. If the boy was kept without defendant's knowledge or consent by some superior authority, there is nothing to show this.

The remaining point is as to alleged misdirection in relation to custody and damages. The action was for wrongful detention from February 14th. The Judge left a question as to taking and detention. The taking here mentioned, Serjeant Sullivan contends, covers, and was intended to cover, the entire period from February 10th, when the local police controlled the plaintiff's movements. Plaintiff's counsel answer that the taking only describes the first step, when plaintiff was received into the depot. Possibly the Judge considered that if the defendant took over the plaintiff in Dublin, he must be assumed to have authorized the earlier arrangements as to transport on the same day, the 14th. There is no evidence whatever that the defendant was acquainted with what had been done on February 10th or

in the intervening period before the 14th. It would be likely that he would have got or given instructions as to transport and reception on the 14th. The Judge stated his opinion to the jury, that the uncontradicted evidence indicated detention by the defendant. Still he left the question to the jury. I do not think that damages were assessed in respect of the days before the 14th, or that what had happened in Tipperary influenced them. Admittedly the defendant's justifications, if any, entirely rested on the Tipperary evidence, but his legal responsibility began on the 14th.

I have come to the conclusion that the verdict should not be disturbed, as the supposed alleged misdirection would not have affected the result, and there has been no substantial miscarriage. Under our present practice, where a new trial is directed on account of fault of jury or Judge for which the litigant is not to blame, the costs of the first trial and of the argument abide the final result, so that the broad question of the invalidity of the defence having been now decided, there would be no advantage in prolonging the litigation. It is unnecessary to examine the questions formulated for the jury. That, asking was the detention for the purpose of interrogation, raised an issue not pleaded, and defendant's counsel disclaimed relying on any such ground of defence, which—manifestly no defence—was inconsistent with the prolonged period of detention. The circumstances of the confinement described by the plaintiff point rather to desire to guard his moral security from illegitimate and undue influence and pressure than to anxiety for his physical safety, which, while he was with his father, was not likely to be interfered with.

Imprisonment of a possible witness quia timet to protect him without his consent from unknown malefactors or intimidation is not within any common law principle of justification, and must be authorized, if at all, by statute. The protection of such witness must be found in the application of criminal law to offenders guilty of overt acts—a remedy in many cases perhaps rather theoretical than real. There may possibly be exceptional cases where, danger existing as a manifest actual fact, temporary interference with liberty of locomotion such as might amount to what the law treats as imprisonment (*Bird* v. *Jones* (1)) might be lawful, but this case discloses nothing of such character.

(1) 7 Q. B. 742.

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GORDON J.:—

I agree in the judgments which have just been delivered. The jury have found that the defendant caused the plaintiff to be taken and detained, and they have assessed the damages at £75. If there is evidence to sustain the first part of this finding, the onus lies on the defendant to show why judgment should not be entered against him for £75 and costs. Serjeant Sullivan contends that there is no evidence that the defendant caused the plaintiff to be either taken or detained, and at the trial he asked for a direction on what is practically the same grounds, namely, that no evidence to bring the defendant into communication with the plaintiff, or that the defendant had personally interfered with the plaintiff, had been produced. He further contends that in any event there is no evidence that defendant took the plaintiff or caused him to be taken, and that the amount of damages must necessarily have been affected if the jury erroneously came to the conclusion that the defendant had caused the plaintiff to be taken as well as detained, and he says that the taking referred to in the question was the taking of plaintiff by the police at Greenane, Co. Tipperary, and that the defendant is not liable for the taking or detention in Tipperary. The statement of claim complains of wrongful imprisonment from 14th February at the depot. That it was the taking at Greenane was referred to in the question is, I think, evident from the other questions and the learned Judge's report of the trial. I see no evidence that the defendant personally had anything to do with the taking or detaining of the plaintiff in Tipperary. The earliest period at which he has been shown to have anything to do with him was when he was brought to the depot. But assuming all this, except Serjeant Sullivan's contention as to its effect upon damages, I am not satisfied that it has occasioned any substantial wrong or miscarriage in the trial, if there was evidence to sustain the part of the finding that relates to the detention at the depot. The plaintiff's evidence is that the police were kind to him, and that he was not afraid at all, and I take it this applies to the whole period from the time he was taken at Greenane till he returned to his house, and therefore the substantial complaint was as to the

detention. The whole period of detention was fifty-six days—four in Tipperary and fifty-two at the depot—and I cannot think that the four days, even coupled with the actual taking at Greenane, would have made any material difference in the amount of damages found by the jury.

Then, was there evidence upon which the jury could reasonably find that the defendant had detained the plaintiff? It was sworn by the plaintiff that on the 14th February he was taken to the depot, and that he was kept there for a long time. His mother swore that he returned home on 8th April. The defendant was not examined, but he had on the 8th of April made an affidavit in the habeas corpus application, which was put in evidence, and in which he described himself as Commandant at the depot, and stated that the plaintiff was at the depot for some time past, and that he had left. It is stated in the statement of claim, and not specifically denied by the defendant, that he was Commandant of the depot in which the plaintiff was detained. As Commandant he had control of the depot in which plaintiff was detained. I am satisfied from this that there was sufficient evidence upon which the jury could find, and properly find, that the plaintiff had been detained by the defendant.

This being the state of the case, the onus was upon the defendant to justify this detention, and this was sought to be done under the defence which the Chief Justice has read. The plaintiff says it discloses no legal defence to the action. The Chief Justice has given a summary of the evidence directed to this defence. The jury found that the plaintiff was taken for the purpose of interrogating him, but as to whether the defendant took him or detained him genuinely believing that his life was in danger, and in order to protect his life, the jury have given no answer. Serjeant Sullivan asked the learned Judge to put the question, "Was the detention of the plaintiff reasonably necessary for the protection of the plaintiff against a felonious breach of the peace directed against him?" This question was not put, and it is contended for the defendant that an answer to it in the affirmative would have been an answer to the action, that there was evidence upon which the jury might have reasonably so answered it; and, this being so, inasmuch as the question had not been put, there

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must be a new trial of the action; the argument being that upon the authority of *Humphries* v. *Connor* (1) and *O'Kelly* v. *Harvey* (2), a police officer can justify a trespass to the person if he can show that it was done necessarily in order to prevent a breach of the peace being committed against the person who complains of the trespass, and that the questions of whether the trespass was necessary, or whether it extended beyond the necessity in the particular case, were for the jury. Put thus broadly, this is a very far-reaching proposition, and would mean that if any person was in danger of being assaulted, or of having any outrage against the peace committed upon him, a police officer could arrest and detain him until the danger had ceased to exist, subject only to being able to satisfy a jury, if an action was brought against him, that such arrest and detention were necessary to prevent a breach of the peace directed against the person so arrested and detained. I do not think the cases cited, nor do any which I have been able to discover, support this contention. The questions involved in *Humphries* v. *Connor* (1) and *O'Kelly* v. *Harvey* (2) have already been sufficiently dealt with. In my opinion these cases do not support the proposition contended for as being applicable in this case. Each of them was decided upon an assumption of the truth of the particular facts and circumstances set out in the defence. In each of them the defendant alleged that he believed, and reasonably believed, or set out facts which showed, that a breach of the public peace was imminent, and that it was necessary to do what was complained of in order to prevent its occurrence. In my opinion they furnish no authority for the contention that a peace officer may detain for an indefinite time a person who has done nothing wrong or illegal, merely because his detention is necessary in order to prevent a breach of the peace being committed against him. No doubt, in certain cases such detention might prevent the person detained from suffering serious injury, or even the loss of his life, and his being at large might result in a breach of the peace being committed against him, and if he agreed to the detention no question could arise. But when he does not agree, as in this case, then, in my opinion, such detention, unless in so far as it is necessary to prevent imminent and

(1) 17 I. C. L. R. 1. (2) 10 L. R. Ir. 285; 14 L. R. Ir. 105.

immediate danger of a breach of the public peace, or of an attack upon him by other parties, cannot be justified; and even an affirmative answer to Serjeant Sullivan's question would not, upon the facts proved in this case, have entitled the defendant to succeed in the action.

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H. J. M'C.

May 3, 4. June 27.

The defendants, Scott and Pearson, respectively appealed to the Court of Appeal, and the appeals came on for hearing on the same day.

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Serjeant Sullivan K.C., *W. E. Wylie K.C.*, and *H. Holmes*, for the appellant Pearson :—

They contended that the defendant as Commandant of the Constabulary Depot was at no time responsible for the arrest and detention of the plaintiff, but this point was subsequently waived as regards the plaintiff's detention at the depot. There was a substantial miscarriage of justice in this case, as the defendant was in no event liable for the arrest of the boy, or for his detention, prior to his arrival at the depot; but no distinction was made at the trial between the detention in Tipperary and the subsequent detention in Dublin. There should consequently be a new trial: *Bray* v. *Ford* (2). This was a case where, on the facts, the plaintiff was in danger: he was marked down for intimidation; and if the defendant could reasonably have come to the conclusion that a breach of the peace would have occurred had the plaintiff not been detained in custody, the defendant is entitled to judgment: *Coyne* v. *Tweedy* (3); *Humphries* v. *Connor* (4); *O'Kelly* v. *Harvey* (5).

(1) In the Court of Appeal, before O'CONNOR M.R., and RONAN and O'CONNOR L.JJ.

(2) [1896] A. C. 44.
(3) [1898] 2 I. R. 167.
(4) 17 I. C. L. R. 1.
(5) 10 L. R. Ir. 285; 14 L. R. Ir. 105.

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A. E. Wood K.C. (*Bewley* with him), for the respondent :—

The cases relied on by the appellant are clearly distinguishable, because in each of them there was, on the facts proved, an imminent danger of a breach of the peace occurring. There is no such evidence whatsoever in this case. It was not proved that the boy was in danger, or that the defendant knew anything of the facts deposed to by the District Inspector. There was therefore no evidence to support the special defence of justification, which is, in any case, demurrable. Mere apprehension as to the general safety of an individual from some wholly undefined attack does not justify his arrest and detention. The only justification would be that an actual and immediate breach of the peace was imminent. The learned Judge at the trial directed in accordance with Lord Hatherley's judgment in *Dublin, Wicklow, and Wexford Railway Co.* v. *Slattery* (1).

There was no such substantial miscarriage of justice as would justify the case being sent to a new trial. O. 39, n. 7.

Cur. adv. vult.

O'CONNOR M.R. :—

This is an action for false imprisonment. The plaintiff is a little boy. The defendant is the Commandant of the R.I.C. Depot, Phœnix Park.

The material facts are these : a murder had been committed in the County Tipperary. The police were making inquiries in the locality, with a view to get evidence which would bring the guilty parties to justice. On the roadside they were putting some questions to the plaintiff about the murder when his sister and subsequently his father interfered. The police then took the boy to the local police barracks, where he was detained for a few days, and from thence he was brought by the police to the R.I.C. Depot in Dublin, where he was detained, until he was released on the 19th April, 1919. It is only the imprisonment in Dublin that is complained of. It is not sought to hold the defendant responsible for the arrest and detention in the County Tipperary.

(1) 3 A. C. 1155, at pp. 1171-2.

It is admitted now that if the detention in Dublin was illegal, the defendant is the responsible party.

The position of Commandant, prima facie, carries with it the control of the depot and responsibility for the admission, detention, and discharge of all persons at the depot.

The learned Judge told the jury that the defendant's responsibility should be taken to have commenced with the original arrest in the Co. Tipperary on the 10th February. This, I think, was wrong, because the defendant was not brought into privity with the plaintiff until the 14th, when he was brought to the depot; but I cannot think that this led to any substantial miscarriage. It only meant an addition of four days' imprisonment to about forty-seven, and, as there was no complaint of harsh treatment or personal inconvenience, there cannot have been any substantial increase in the damages awarded. I doubt if it meant any increase. The misdirection did not affect such a substantial matter as that in *Bray* v. *Ford* (1), which was an action for libel against a solicitor, the principal libel against him being that he improperly made profit costs in a matter in which he occupied a fiduciary position. The learned Judge at the trial told the jury that in the circumstances he was legally entitled to charge profit costs. This, of course, was a material fact which the jury should take into consideration, because it meant that the accusation had nothing to support it. The libel complained of contained other defamatory matter, which entitled the plaintiff to a verdict. The jury assessed the damages at £600. The House of Lords, reversing the Court of Appeal, directed a new trial, on the ground that there was a substantial miscarriage. Lord Halsbury based his judgment on the fact that an important and serious topic had been improperly withdrawn from the jury—viz., that the main charge made against the plaintiff was well founded. Lord Watson, in his judgment, said that in one aspect, that presented to the jury by the learned Judge, the accusation made by the defendant conveyed a wholly baseless and libellous charge, while in the other aspect, which the House held to be the true one, a well-founded charge was made, which was followed up by other libellous imputations. That was a wholly different case from the

(1) [1896] A. C. 44.

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present. I see nothing in the misdirection that would warrant an order for a new trial.

But a special defence justifying the detention was pleaded. It is as follows:—In the alternative the defendant says that the plaintiff, by reason of his actions in aid of the administration of justice, was in great danger of life and limb from the members of a criminal organization, whose activities were widespread throughout the country, and it was necessary for the protection of the plaintiff that he should be detained in a safe place and guarded, and the acts complained of were done by the defendant, if at all, in the discharge of his duties as a peace officer for the prevention of criminal attacks upon the plaintiff.

In my opinion this was a demurrable defence. It is entirely novel, and there is no authority to support it. The cases which have been cited are no authority for it. I say nothing more about this now, because I have dealt with them in my judgment in *M'Laughlin* v. *Scott* (1). But further, the evidence does not support the defence. No one could read the evidence of District Inspector Neylan without seeing that the object of the original arrest was to procure evidence. There is no affirmative evidence that the plaintiff was subsequently detained for the purpose of protecting him. The District Inspector merely stated that in his opinion the plaintiff's life would have been in danger. He was not asked nor did he state when that opinion was formed, whether it was before or at the date of the arrest and detention in Co. Tipperary. It may have been only the opinion held when he was giving evidence—an opinion formed by the light of his latest experience. The evidence of the County Inspector is open to the same criticism, with the added observation that it was entirely general in its character, as it applied to all witnesses. The defendant gave no evidence, with the result that as to the period of detention in Dublin from the 14th February till April, when he was released, there was no evidence that the purpose operating in the defendant's mind was to protect the plaintiff. Indeed, I feel that I am justified in going further, and holding that, as the purpose of the original arrest and detention in the Co. Tipperary was to procure evidence, that purpose continued, no evidence having been given of a change of purpose. In my opinion the appeal should be dismissed with costs.

(1) Post, p. 92.

RONAN L.J.:—

In this case we must either, 1, dismiss the appeal, which means affirm a judgment for the plaintiff for £75 and costs of the entire action; or, 2, make some other order which we think the Court below ought to have made.

I am of opinion that the law prohibits us from making any other order than (*a*) an order dismissing the action, or (*b*) an order for a new trial. We have no power to enter judgment for any sum less than £75, except by consent. This is admitted, and is settled by the cases of *Bray* v. *Ford* (1) and *Watt* v. *Watt* (2). These cases are not, in my opinion, rendered less applicable to the present by the decision of the majority of the House of Lords in *Lionel Barber & Co.* v. *Deutsche Bank (Berlin) London Agency* (3). There the verdict was reduced, not by substituting one sum for unliquidated damages for another, but by taking from the verdict a specific liquidated sum of £460, which the jury were by misdirection told they might include in their verdict.

It is clear that we ought not to dismiss the action. It is equally clear, in my opinion, that we cannot dismiss the appeal, and allow a judgment for £75 to stand. The only possible order in these circumstances is an order for a new trial, and there has been no suggestion, either here or in the King's Bench Division, that there is any other alternative.

The facts and circumstances of the case divide themselves naturally into two parts, viz.: 1, What took place prior to the plaintiff's reception at the depot, i.e. arrest and four days' detention and removal in custody to Dublin. 2, What took place after his reception there. The detention and imprisonment complained of in the statement of claim is specific: "On the 14th February the defendant wrongfully imprisoned the plaintiff at the Constabulary Depot, Dublin, and there wrongfully detained him till the 9th of April." The only other matter is a charge of conspiracy, which the Judge directed the jury to find for the defendant, and no question arises in reference to it. The consent admits that the defendant in fact detained the plaintiff at the depot. I shall assume for this part of my judgment that the

(1) [1896] A. C. 44. (2) [1905] A. C. 115.
(3) [1919] A. C. 304.

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Judge was entitled to direct the jury that the defendant had not justified this detention. On this assumption, therefore, the plaintiff was entitled to damages for this detention, and this is all that is claimed in the statement of claim. I shall call these damages X. On the other hand, there is really no pretence that the defendant is responsible for what took place prior to the reception at the depot, viz., arrest by armed men, detention for four days in a police barrack, removal in custody, and a long journey to Dublin. I shall call the damages recoverable for these matters, if the defendant was responsible for them, Y. If the action was brought for Y alone, what damages would the jury, if properly directed, have given? If it was brought for X alone, what damages would the jury, if properly directed, have given? If it was brought for both, what damages?—Z.

In my opinion the Judge in this case in terms directed the jury that the defendant was "responsible from the beginning for what was done," i.e., for X + Y, and the jury assessed the damages accordingly at Z = £75. This is given for X and Y. The problem is to find X and Y. Can we assume even that Z = X + Y? That would give, at all events, X + Y = £75. How are we to apportion it? Let us speculate for a moment. The child is arrested by police, brought to the police barrack, kept there for four days, then taken away on what must have seemed to him an enormous journey in custody to Dublin. He thus describes the arrest:—"Four policemen hopped out of the ditch, and told me to stand. They asked me my name. I gave it. They then asked me did I know who killed the two policemen. I said I did not. They then put me into the motor, and drove me off to Tipperary Barracks. There were soldiers with the motor cars; they had guns and bayonets. The policemen and a soldier were in the car with me. Before I was arrested, I had never spoken to the police about the murders. On Friday, the 14th, I was put into a motor car, and a coat was put on me. I was taken to Limerick Junction. District Inspector Neylan and two other policemen were with me. I was brought into the station and put into a train, and was taken to Dublin. The same three police were with me to Dublin. At Dublin we got into a motor, and I was taken to the Depot, Phœnix Park." Is it

reasonable to assume that a jury would allow no damages for all this? If the jury were told the defendant was responsible for all this, and he was not responsible for any part of it, can any verdict based on such a direction stand?

The plaintiff finally arrives at the depot. He finds he is kindly treated, probably better fed and lodged than he ever was in his life—a labourer's son. What is his own account? "The police treated me kindly. The serjeant was with me the whole time. He was very kind to me; I was happy with the serjeant." One juryman may say, it was the original wrongful arrest that caused all the trouble. They did not know what to do with him when they had taken him. The man in Dublin only took him off their hands, and treated him kindly. The boy was happy there, he was well looked after, and escaped school. It was the man who arrested him that ought to pay the damages. Y ought to be the greater part of the damages. Another may think the period of detention the most important item. If the Judge had said the plaintiff is entitled to damages—1, for his arrest; 2, for his detention in Tipperary, four days; 3, for his removal in custody to Dublin; 4, for his detention in Dublin, fifty-two days; put a figure on each, and the total ought to be the damages, we may speculate as to how they would have done so, but certainly the most improbable of all speculations is that they would have done it thus:—1, 0; 2, 0; 3, 0; 4, £75. Yet it is practically on this basis that Gordon J., the only one of the Judges in the Court below who deals with this question on the basis of the misdirection, supports the judgment for £75. The Lord Chief Justice, strangely enough, does not refer to the question of damages at all, and Gibson J. only deals with it in a way I shall mention later on.

As it is important to show that this question of damages was fully discussed in the Court below, I shall now refer to the judgment of Gordon J., as it contains a clear statement of the argument, and of his own opinion as to the evidence, the direction, and the result. It will be seen that he is clear on the following points: 1, that there was no evidence of any liability of the defendant for anything that occurred prior to the reception of the plaintiff at the depot; and, 2, that the damages were

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given for the entire transaction from the arrest. Gordon J. treats this part of the case carefully. He says [His Lordship read from the words "Serjeant Sullivan contends," &c., to the words "detention in Tipperary" (see ante, p. 72), and continued:—]. I have stated this at length to show that this question was fully argued in the King's Bench. Gordon J. then proceeds to deal with the argument thus [His Lordship read from the words, "that it was the taking," to the words, "when he was brought to the depot," and continued:—]. These are Gordon J.'s conclusions as to the result of the evidence. He then proceeds [His Lordship read from the words, "But assuming all this," &c., to the words, "the amount of damages found by the jury," and continued:—]. This is, of course, pure speculation. Let us speculate: (A) 4 is $\frac{1}{14}$th of 56; £5 7*s.* is $\frac{1}{14}$th of £75. That would take £5 7*s.* off the judgment, giving nothing for arrest and removal. (B) £1 per day would be £56. £20 for arrest and removal in custody to Dublin would not be extravagant; that is, £76. Of this, £20 and £5 7*s.* should come off for the matters prior to the detention at the depot. (C) Or, £50 for Dublin and £25 for the rest is very plausible. But nothing for arrest, or removal, or detention in the police barracks is, in my opinion, an impossible speculation. The Judge has not told us what he means by a "material difference." If the verdict ought only to have been for £70, can it stand? If it might reasonably have been for a less amount than £75, if the jury were told that the defendant was only responsible for Dublin, can it stand?

I shall now read the Judge's report of what took place at the close of the plaintiff's case, and at the close of the entire case, and the Registrar's certificate. [His Lordship referred to the report and certificate (ante, pp. 52, 59), and continued:—] The certificate makes no distinction between questions on which a direction was given and those which were left to the jury. Question 4 and the answer, where there was a direction, appear in exactly the same way as the others. Therefore no weight can be placed on the statement: "the following questions were submitted to the jury." It is equally consistent with the presence or absence of a direction. The questions plainly draw a distinction between "taking" and "detaining." No. 2 deals only with taking; No. 3 only deals with detaining; Nos. 1 and 5 with the whole case.

It will be seen that the jury agreed as to 2 (B), that "the taking" was for the purpose of interrogation. This was plain from the evidence of District-Inspector Neylan: "I told the boy's father I would have to take the boy to the barracks to get a complete statement." But they were unable to agree (3 (B)) as to whether the "detention" was for this purpose. The first question deals both with the taking and detention. I agree with the statement of Gordon J.: "that it was the taking at Greenane was referred to in the question is, I think, evident from the other questions and the Judge's report of the trial." In my opinion this is proved by the fact that the Judge expressly declined Mr. Healy's request to limit the question to the detention by defendant at the depot. Mr. Healy's question was (*a*) confined to detention as distinguished from taking, and (*b*) to the depot. In the Judge's question, "cause the plaintiff to be taken and detained" was plainly intended to include both what took place in Greenane, Tipperary, and in Dublin. It is immediately followed by separate questions as to taking and as to detention. Mr. Healy had the Judge's questions before him. He framed a question carefully eliminating "the taking," and confining "the detention" to the depot. The Judge will not accept it, because "it was implicit in the question put." This can only mean included in the much wider questions framed by him. All this was prior to the charge. On this alone I should have no doubt that the first question was intended by the Judge, and understood by everyone, to cover the entire transaction. But what took place after the charge puts the matter beyond the sphere of doubt. Fortunately in this case Serjeant Sullivan took down the words of the Judge as if he was preparing a bill of exceptions. Curiously enough, he spoke of his note of objections to the charge as his "dominical," the old term in such cases, and the Judge received it and quotes it as accurate. It is vital in considering this to note that the Judge does not suggest that these passages do not fairly represent his directions to the jury, or that there was anything in the charge to limit or vary their effect. I first take the Judge's summary of the case at the beginning of his report: "The boy had, as will be seen by the evidence, given some information to the police. He was taken by District-Inspector

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Neylan to and brought into the barracks in Tipperary for the purpose of getting a complete statement from him. He was kept there for four days, and then sent up to the depot in the Phœnix Park, where he was kept for about two months." There was no dispute about any of these facts. I now take the Judge's direction to the jury on these facts from the report. "Serjeant Sullivan made the following objections to my charge: I respectfully object to the following passages in your Lordship's charge: 'You must begin the case with the assumption that if a wrong had been done, Mr. Pearson, the defendant, is responsible. Defendant must be held responsible from the beginning for what has been done. If he was taken and detained, it was Mr. Pearson who took and detained him.'" The report adds these words: "I think I said, 'you must assume that it was Mr. Pearson who took and detained him.'" This was after the Judge had refused Mr. Healy's request to limit the question to the detention in Dublin. I must repeat, the Judge does not suggest that there was anything in the charge to modify these directions to the jury. On the contrary, he says "the substance of what Serjeant Sullivan complained of in my charge is correct." The Judge adds, "but the statements only amounted to a statement of the position in view of the fact that the defendant had not appeared." This can only mean that the Judge said, "as the defendant has not appeared, the position of the case is this, you must begin the case with the assumption, &c. Defendant must be held responsible from the beginning, &c. If he was taken and detained, you must assume (I take his correction) that it was Pearson who took and detained him."

I confess I cannot see how this alters the matter. The Judge then says: "Either the defendant must be held responsible for taking or detention, or I should have directed the jury to find for the defendant. I so told the jury, and they completely understood it." But what does it mean? It can only mean this: "Gentlemen, if the defendant was not responsible for the taking and detention, it would have been my duty to direct a verdict for him. As I have not done so, he must be held responsible." It only makes the direction more emphatic.

I now come to the judgment of Gibson J. [His Lordship

referred to the judgment (ante, p. 67), and continued :—] Serjeant Sullivan's contention in the King's Bench Division and before us was that question number 1 covered the whole transaction from beginning to end, that "taking" meant what the boy called his arrest. Gibson J. says: "The plaintiff's counsel answer that the taking only describes the first step, when plaintiff was received into the depot." That is, that "taking meant his admission to the depot." This is the only other meaning of taking suggested in the case. Does Gibson J. hold that this is what the questions and the charge were calculated to convey to the jury? It makes nonsense of the distinction between questions 2 and 3, viz., what was the defendant's belief (*a*) when the boy was on the door-step (question 2); (*b*) when he was inside the door (question 3)? As Gordon J. points out, these questions make it evident that it was the original arrest that was referred to.

He next comes to the charge. "The Judge stated his opinion to the jury that the uncontradicted evidence indicated detention by the defendant." (He omits "taking.") "Still he left the question to the jury." This is his entire statement as to the charge and its effect. What is it? This: "In my opinion, you may infer detention by the defendant from the uncontradicted evidence." I wonder how many times Gibson J. has discussed the question when "may" means "must" or "shall," but I never before came across a case in which it was suggested that "must" is a permissive term, and means "may." However, this is the Judge's (Gibson J.) construction of the words: "If he was taken and detained, it was Mr. Pearson who took and detained him," paraphrased by the Judge (Pim J.) thus: "I think I said, 'You must asume that it was Mr. Pearson who took and detained him.'" The word "must" occurs practically in every sentence affecting the charge in the report. It is used four times—twice in Serjeant Sullivan's dominical, twice by the Judge himself. How does Gibson J. construe "must" in the direction, "you must begin the case with the assumption that if a wrong has been done the defendant is responsible," and in the direction, "defendant must be held responsible from the beginning"; and in this statement of Pim J.: "Either the defendant must be held responsible for taking or

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detention, or I should have directed for the defendant"? Pim J. accepts them without paraphrase.

So far we have no indication as to whether Gibson J. thought "taking" meant the original arrest or the reception at the depot. He does not refer further to the vital question whether the jury were told that the defendant was liable in damages (*a*) for the whole transaction from the beginning, or only (*b*) for the detention at the depot. He deliberately abstains from giving any opinion on the question; he held it was immaterial, because—I state this with hesitation, but I can put no other meaning on his judgment—if the jury were told (*a*) they would either have disregarded the direction and assessed the damages as if they had been told (*b*), or else, if they did take into account the arrest, detention in Tipperary, and removal, their assessment was arrest, 0; four days, Tipperary, 0; removal, 0: depot detention, £75. The words of the judgment are: "I do not think that damages were assessed in respect of the days before the 14th, or that what happened in Tipperary influenced them." "I have come to the conclusion that the verdict should not be disturbed, as the supposed alleged misdirection would not have affected the result, and there has been no substantial miscarriage." Gordon J. only thought it would not materially affect the result. Gibson J. is positive that it would not have affected the result at all. He is certain that a jury would give no damages for arrest—four days in Tipperary and removal to Dublin. I am of opinion that the jury were directed that the defendant was liable for the entire damages X and Y referred to in the beginning of my judgment; that there was no evidence that he was liable for the damages except for the detention at the depot. The action was only brought for this, and the plaintiff's counsel asked the Judge so to limit the matter. I have endeavoured to show that the speculations of Gordon J. and Gibson J., that the damages would have been the same if the misdirection had not been given, are highly unreasonable on the facts.

I shall now refer to two cases which, in my opinion, establish beyond doubt that the Court is not justified in making any such speculations, and that even if the Court agreed with the speculations, still there must be a new trial. The cases also establish

that if the misdirection is capable of inflicting injustice on the party, the Court must not speculate whether this in fact occurred or not. Such a case does not come within Order 39, rule 7.

In the case of *Bray* v. *Ford* (1), Ford, the plaintiff, was Vice-Chairman of a College, and acted as solicitor for it. Bray, defendant, was a Governor of the College. Bray published a libel on Ford charging him (X) with making profits illegally and improperly as paid solicitor to the Board, and (Y) making other grave libellous charges against him. At the trial, Cave J. told the jury that Ford was lawfully entitled to these profits. The jury found a verdict for £600. That is, the verdict was for (X) + (Y). The defendant applied to the Court of Appeal for a new trial on the ground of misdirection as to these profits. The case is not reported in that Court. I take the account of it from the judgments in the House of Lords. It is clear that both the Court of Appeal and the House of Lords held that Cave J. had misdirected the jury, and that Ford was not entitled to these profits. Therefore, the plaintiff was not entitled to damages for X. His right to damages for Y was not disputed.

I now take the judgment of Lord Herschell at p. 52: "It is clear, however, that the learned Judge misdirected the jury, and that, as the misdirection cannot be said to have been on a point wholly immaterial, the appellant would have been entitled, prior to the Judicature Act, to a new trial as of right." This is very important. He continues: "Order 39, rule 6, provides that a new trial shall not be granted on the ground of misdirection, unless, in the opinion of the Court, some substantial wrong or miscarriage has been thereby occasioned in the trial. The Court of Appeal came to the conclusion that there had been no such wrong or miscarriage in the present case. They thought, as I understand, that the nature of the libel was such that the jury would have been entitled to give, and would probably have given, the same verdict, even if the direction of the learned Judge had been the other way. If I had thought that the enactment relied on sanctioned dealing with the case in this way, I am far from saying that I should have differed from the conclusion at which they arrived. But I have come, with some

(1) [1896] A. C. 44.

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reluctance, I own, to the conclusion that it does not." Having pointed out that in cases other than those of unliquidated damages, such as libel, the rule may apply, he says: "But the assessment of damages is peculiarly within the province of the jury. The damages cannot be measured by any standard known to the law . . . The latitude is very wide. It would often be impossible to say that the verdict was a wrong one, whether the damages were assessed at £500 or £1,000. Where, then, the Judge so directs the jury as to lead them to take an erroneous view of any material part of the alleged libel, and this view may have affected their minds in considering what damages they should award, I think there has been a substantial miscarriage within the meaning of the rule. The Court may think, as I might think in the case before your Lordships, that the jury would have given the same damages if the law had been correctly expounded; but this is a matter of mere speculation; it cannot be asserted with the least certainty that they would do so. The jury have returned their verdict on what they were erroneously led to think was the case, and not on the real case which the defendant was entitled to have submitted to them."

I have taken this judgment first, as it contains the account of what occurred in the Court of Appeal. The first judgment was that of Lord Halsbury. It is to the same effect. Having said that there was a misdirection, he says: "What influence such a wrong might have had upon the verdict or upon the amount of damages I am not disposed to consider . . . It is nothing to the purpose to say that the rest of the printed matter complained of as a libel would have justified a verdict to the same amount of damages. I absolutely decline to speculate what might have been the result if the Judge had rightly directed the jury." Lord Watson, after stating the rule, says: "Every party to a trial by jury has a legal and constitutional right to have the case which he has made . . . fairly submitted to the consideration of that tribunal." He holds that the misdirection was "a miscarriage" within the meaning of the rule, and says: "The only question, therefore, is whether the miscarriage has been substantial within the meaning of the order." Having stated the facts, he points out the effect of the misdirection thus: "In the one aspect"

(i.e. that of the misdirection), "the appellant's letter conveyed a wholly baseless and libellous charge; in the other" (i.e. of proper direction), "a well-founded accusation, followed up by language which conveyed other and libellous imputations. I do not feel myself in a position to affirm that in each of these cases the same jury would have awarded the same sum of damages. I could not possibly arrive at that conclusion without first assessing the damages in each case for myself; and that is a duty which, in my opinion, I ought not to undertake in a case like the present. In such a case the assessment of damages does not depend upon any definite legal rule, and is the peculiar function of the jury, by whom the party liable is entitled to have the measure of his pecuniary liability determined." Lord Macnaghten concurred in this important judgment. Lord Shaw gave judgment to the same effect. This case was decided twenty-five years ago. It has never been questioned. I should have thought it would have put an end to speculations as to what unliquidated damages a jury would have found if a substantial misdirection had been given. With great respect for those who take a different opinion, I think it has done so, and that this Court should follow that decision.

In 1912, in a case of *Sandford* v. *Porter* (1), *Bray* v. *Ford* (2) was considered and followed in this Court. The case is complicated in its facts; but the head-note states the effect of the case so far as it applies to the present case thus: "That under the circumstances of the case the misdirection was capable of inflicting injustice on B, and that without speculating whether or not this in fact occurred, the case did not come within Order 39, rule 7," and the judgment must be set aside. The judgment of the Lord Chief Baron in the Court below, at p. 563, of the Master of the Rolls, at pp. 577–8, and of Holmes L.J., at p. 583, fully bear this out. There is, however, a very important matter dealt with in the judgment of the Lord Chief Baron at pp. 561, 562; that is, the effect of sect. 48 of the Irish Judicature Act of 1877, and of sect. 22 of the English Act of 1875. [His Lordship read from pp. 561, 562.] It is very strange that the effect of the section on the rules does not appear to have been discussed in any reported case.

(1) [1912] 2 I. R. 551.

(2) [1896] A. C. 44.

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The case of *Smith* v. *Trimble* (1), in the House of Lords, was heard before six Law Lords. When I read the section of the Irish Act, it made a considerable impression; but when I cited sect. 22 of the English Act of 1875, it was plain that none of them had ever heard of it before. They sent for the statute. When it was read, Lord Halsbury said, "You have your statute, and are entitled to rely on it." I then pointed out that the language of Lords Halsbury and Watson (quoted above) in *Bray* v. *Ford* (2) practically went the full length of the section.

In my opinion, the view of the Lord Chief Baron is correct, and the defendant in this case is entitled to a new trial as a matter of right. However, *Bray* v. *Ford* (2) and *Sandford* v. *Porter* (3) establish beyond doubt, in my opinion, that the defendant is equally entitled to a new trial, "assuming" (in the words of the Lord Chief Baron, at p. 563) "that I am wrong as to the effect of sect. 48, and that the rule . . . is a legal rule." The law is settled that the Court cannot dispose of the matter by reducing the amount of the unliquidated damages.

There is another very simple ground on which I am of opinion that this verdict should not stand. The jury agreed that the taking of the plaintiff was for the purpose of interrogation. This was stated, as I have said, by the District Inspector who took him. They were unable to agree as to whether he was detained for this purpose, and they were unable to agree either as to taking or detention, as to whether the defendant genuinely believed that the plaintiff's life was in danger. Surely, in such a case the damages would be widely different if they thought there was no belief as to danger, and that the allegation was a pretence, from what they would have been if the jury thought the defendant acted bona fide for the safety of the boy's life. Jurors differing as to this could not properly agree as to damages. I express no opinion on the other questions in the case.

O'CONNOR L.J.:—

I fail to see the slightest defence to this action. The ground relied on to justify the plaintiff's imprisonment is this: that if he were allowed to be at large, he would be in some danger of death

(1) Unreported. (2) [1896] A. C. 44. (3) [1912] 2 I. R. 551.

or injury, arising from the violence of persons wishing to cloak the perpetrators of a crime of which the plaintiff knew, or was supposed to know, something. Personally, I do not think there was any real fear of injury to the boy. If he had been allowed to go free, a few minutes' conversation with his father or relatives or others would have effectually stopped his mouth, unless, indeed, this boy is quite unlike all other boys. That this should be so is, of course, very regrettable, but we must take things as we find them. The notion that to prevent this boy giving evidence wicked people would find it necessary either to shoot or maim him seems to me grotesque.

But even if I thought that there was some chance of danger to the boy, or, perhaps, I should say, some evidence of it, that helps the defendant not a whit. You cannot incarcerate a man or a boy merely because his going abroad or his doing something that he is minded to do exposes him to some danger. If that were so, the adventurous spirits that sought the North Pole or the interior of Africa, or that conquered the Atlantic in flight, might have been locked up for their own good. Nor does the fact that the supposed danger arises from the designs of wicked men warrant interference with the wish of him who desires to brave it. If it were otherwise, every informer in Irish history could have been locked up for life. The cases that have been referred to have not the most remote resemblance to this case. If any person, civilian or policeman, sees a breach of the peace about to occur before his eyes, he can then and there take reasonable steps to prevent it. But what connexion that state of facts has with a state of facts in which it is the merest speculation whether a breach of the peace will ever occur, when it will occur, or by whom it will occur, I fail to see.

A point has been raised as to the damages. It is said that the jury gave damages in respect of the entire detention, commencing with the detention in Tipperary; in other words, the damages were for detention from the 10th February, 1919, to the 9th April, 1919, a period of fifty-eight days, instead of from the 14th February, 1919, to the 9th of April, 1919, a period of fifty-four days. The action was brought, as the statement of claim shows, for the period commencing with the 14th February, and for no other

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period; the action was fought on that basis, and no amendment of the pleadings was suggested or asked for; and it is perfectly clear, to my mind, that the question put by the learned Judge applied to, and was perfectly understood by all parties—Judge, jury, and counsel—to apply to, the detention in the depot from the 14th February. There is, therefore, nothing in this point, which, apart from the want of merits, is, I think, not open to us, inasmuch as the notice of motion to the King's Bench Division and the notice of appeal to this Court were altogether silent as to it.

K. B. Div. 1920. Feb. 5, 21.

M'LAUGHLIN *v.* SCOTT.

CASE STATED by the Right Hon. Mr. Justice Dodd on the hearing of civil bill appeals at the Summer Assizes for the County Mayo.

The case set out as follows:—The civil bill was for damages for trespass to the person and for false imprisonment. The case was tried at Sessions by a jury, and the County Court Judge had given a decree for £25 (pursuant to findings and award of the jury empanelled to try questions of fact).

Mr. Leonard K.C. and Mr. Charles Bewley were counsel for the plaintiff; and Mr. Fetherstonhaugh K.C. was counsel for the defendant.

The boy John M'Laughlin was examined, and deposed:—On the 3rd April a policeman came with a message. I was brought into the barrack. I was brought into the day-room. I was kept there night and day. There was no bed. I was given a policeman's greatcoat. I had an interview with Captain Scott, the District Inspector, the defendant, on the 4th or 5th April. He told me he was going to send me to Castlebar. There is more room there, he said. I did not ask why I was there. I was brought to Castlebar on the 5th to the day-room. Tom O'Connor was brought with me. I was kept till after 9 o'clock. I was not allowed to speak. I was put into a cell at 10 o'clock. We were taken into the day-room. I was kept in Castlebar seven weeks—a month without a bed. I got two coats. I did not go to Mass. I asked and was refused. I asked when I would be let go. I

asked Head Constable Allen. He told me to prepare for another month. I was taken up to Dublin, and there released.

[The proceedings on the habeas corpus application were referred to, but not put in.]

Michael M'Laughlin, the father, and Thomas O'Connor were also examined. Their evidence was to the same effect, and is not further relevant.

Mr. Fetherstonhaugh said the case for the defendant was that the life of the young man would have been in danger, that he acquiesced, that he was not a prisoner. He referred to *Humphries* v. *Connor* (1) and *O'Kelly* v. *Harvey* (2). He called Captain Scott, who swore as follows:—He said the town was in a state of unrest after the murder of the Resident Magistrate, Mr. Milling, and proceeded:—I considered it in the boy's interest to keep him under police control. The boy made no objection. He made no complaint that he was not well treated. He was provided with all reasonable comfort. I think it would not have been safe to let the boy out except with a police escort. It would not have been safe to have allowed him to go to Mass. [The witness protested that the boy was not "a prisoner," meaning thereby a person charged with an offence. But he said he would not be allowed out.] The conditions had altered when the habeas corpus proceedings were commenced. I could not let him out without making a report to my superior officer. He was cross-examined, and said—"I had other reasons for keeping him, but his safety was my first reason." Asked why he was put in a cell, he said he was not put in a cell save when there was no constable to protect him. "We were responsible for him."

To me.—"I had as a police officer facts before me which led me and my superior officer to the conclusion that it would not be safe for the boy not to be under police control. I cannot in the discharge of my duty disclose to you the facts upon which this opinion was based. When I said this was not the sole reason, I meant it was the dominating reason. As a police officer I would sooner not say what the other reasons were. The reason for my keeping him safe was that he had been seen going to the police barracks, and being in communication with the police."

(1) 17 I. C. L. R. 1. (2) 10 L. R. Ir. 285; 14 L. R. Ir. 105.

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Mr. Leonard then asked was not the message to the boy sent by the defendant. He said it was sent from the police barracks. He accepted responsibility. Asked again why then was it safe to discharge him on the 12th May, he replied that his people were then willing to look after him; they had not said so for a long time.

Constable Allen proved that Westport was declared a military area on the 4th. On cross-examination, he said the facts that called for the proclamation existed upon the 3rd April, and prior thereto, from the date of the murder.

The case in the Court below was tried by a jury, who found that the boy was well treated, and they awarded £25 damages.

Mr. Fetherstonhaugh contended:—

1. That the murder of Mr. Milling, R.M., on the 31st March, 1919, being known to the defendant to be the outcome of a dangerous conspiracy in and about Westport, which was in a state of serious disturbance, and was proclaimed a special military district on the 3rd April, and the plaintiff having been known to have gone to the police barracks, and known or believed to have made communications to the police, it would be believed or feared by persons who knew what information the plaintiff could probably give that he had, whether willingly or not, put the police in possession of facts detrimental to the murderers. Therefore there would be danger that plaintiff's life would be taken before his evidence could be made available, and therefore the defendant as a police officer was justified in taking what he considered necessary measures for the protection of plaintiff by keeping him under guard, first at Westport, and later at Castlebar, more remote from the scene of the murder, and was justified in detaining him till satisfied he was no longer in danger, which happened when he found that plaintiff was regarded with favour because he was detained, and no arrests had followed his communications, and his relatives were satisfied they could safely take charge of him, when plaintiff was at once released from guard.

2. That defendant as a police officer could not reasonably in the public interest disclose all the facts leading him to the conclusion he came to as to detaining the plaintiff, and that the facts disclosed or assumed by both sides to be in the knowledge of the Court were sufficient to justify the defendant.

Mr. Leonard and *Mr. Bewley* contended:—

1. That inasmuch as defendant admitted that it would have been safe to discharge plaintiff on the 12th May, the defence put forward could not in any event justify the plaintiff's detention after that date up to the date of his release on the 22nd May.

2. There is no authority for any such proposition as that the interference by one person (without statutory authority) with the liberty of another who is not a wrongdoer ceases to constitute an actionable wrong though the former believes, and even proves reasonable grounds for believing, that his acts are in the best interests of the person interfered with.

3. The widest proposition which can be deduced from the cases cited by the defendant is that in certain cases acts prima facie actionable may be justified by proof of (*a*) reasonable grounds for apprehending an immediate breach of the peace, and (*b*) that the acts complained of were necessary to prevent same, and (*c*) that they were no more than was necessary for that purpose.

4. No defence can be relied upon unless the facts which would constitute such defence are proved before the Court.

5. The matters relied upon by the defendant were material only in mitigation of damages, and the jury in the County Court had evidently had regard to them in this respect.

I find as a fact that the boy was detained against his will. The question then arises: Was there evidence on which I could act in support of a justification of the detention? I was much impressed by the bearing and manner of the defendant, as apparently also were the jury in the Court below. I am satisfied he bona fide believed it was his duty as police officer to keep the boy under police control; and having regard to the entire circumstances, I believe also he was within his duty in declining to give me the facts upon which his decision was based. But the question for the Court is: Was there any evidence of justification?

I had prepared this case before the Long Vacation, with a blank for counsel on both sides to insert their contentions. It is now returned to me with the contentions inserted. I make no objection to what has been inserted, but the difficulty I had is not quite met. It was not, as Mr. Fetherstonhaugh suggests, whether there was some evidence. The question is whether there was evidence upon which, according to our law, I could act.

1. Was the plaintiff entitled to be informed of, and were his counsel entitled to examine into, the facts upon which the defendant relied as giving him reasonable grounds to detain the plaintiff?

2. Was the defendant, as an officer of the police, who was prevented by the Crown, and by his own sense of public duty, from

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telling the full facts, entitled to a decision from me in his favour if I gave credence, as I did, to his statement that at a time of crisis and danger he in good faith did what he did to preserve the life of the boy?

As to Mr. Leonard's and Mr. Bewley's contention with reference to the continuance of the detention, I did not reserve any question. If the original detention was unlawful, the defendant is answerable. If it was not, he is not answerable. I had no facts before me as to who was in charge of the boy, nor any evidence as to when he might have been set at liberty.

The case is the converse of *M'Elveney* v. *Connellan* (1). The plaintiff there was non-suited, because the Crown would not produce the document necessary to support the plaintiff's case. Was the defendant's plea of justification here to be decided against him because the Crown would not permit him to give the facts on which his defence rested? I was entitled to draw inferences from such facts as were proved, but could they take the place of affirmative evidence? I think I ought to frame and answer questions, as if there were a jury, so as to put the Court in a position to decide the grave constitutional question that seems to me to be involved, and to answer them. I say "the Crown," because it was not disputed that the defendant in withholding the evidence was acting under instructions. I did not require the Attorney-General to appear and claim the privilege. I find therefore—

1. There was unrest in Westport, following upon the murder of the Resident Magistrate in the town of Westport.

2. Such unrest was likely to create feelings of animosity to anyone believed to be in communication with the police as to the crime, to such an extent as to give reasonable apprehension of danger to his life.

3. The plaintiff was believed to be in communication with the police.

4. The defendant believed the boy's life was in danger, and acted in good faith.

5. There were reasonable grounds for such belief.

(1) 17 I. C. L. R. 55.

The questions I submit are:—

1. On the facts proved before me, was there evidence to support all or any of these findings?

2. Do these findings, or such of them as the Court may support, amount to a justification of the detention good in law?

If question 2 is answered in the affirmative, the decree is to be reversed, with costs. If not, the decree for £25 is to be affirmed, with costs and expenses.

Leonard K.C. and *Bewley*, for the plaintiff.

Fetherstonhaugh K.C., *Wylie K.C.*, and *Holmes*, for the defendant.

Cur. adv. vult.

MOLONY C.J.:—

This is a case stated by Mr. Justice Dodd, from the Summer Assizes for the County of Mayo. The civil bill was brought by John M'Laughlin, who is a minor, by Michael M'Laughlin, his father and next friend, against Victor Scott, D.I., R.I.C., claiming damages for trespass to the person and false imprisonment. The case was tried before the County Court Judge and a jury, and the jury found for the plaintiff, assessing damages at £25.

The defendant appealed, and upon the hearing of the appeal the present case was stated.

The facts of the case are somewhat similar to the facts in the case of *Connors* v. *Pearson* (1), and the principles of law involved are the same in both cases. It appears that the plaintiff, in consequence of a message, went to the police barrack at Westport on the 3rd of April, and he was kept in custody until the 12th of May, first in Westport, and afterwards in Castlebar.

The learned Judge has found the following facts:—[His Lordship read the findings.]

And upon these findings the learned Judge submits two questions, namely:—

1. On the facts proved before me, was there evidence to support all or any of the findings? and

2. Do these findings, or such of them as the Court may support, amount to a justification of the detention good in law?

(1) Supra, p. 51.

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Molony C.J.

There was evidence to support the first finding, as the fact was sworn to positively by the defendant. There was no satisfactory evidence that I can find to support the second finding. The defendant said it was in the boy's interest to keep him under police control, and that it would not have been safe to let him out except with a police escort; but this evidence is not, in my opinion, sufficient to support the second finding. As regards the third finding, the defendant swore that the reason for keeping the plaintiff was that he had been seen going to the police barrack and being in communication with the police, but there is no evidence whatever that he had in fact been seen. As regards the fourth and fifth findings, the defendant said that on the facts before him he had come to the conclusion that it would not be safe for the boy not to be under police control, but there is no evidence that he believed the boy's life was in danger, or that there were reasonable grounds for such belief.

It appears to me therefore that while there was evidence to support one of the findings, it was not sufficient to justify the defendant in detaining the plaintiff, and consequently I think that the second question should be answered in the negative, and that the defendant should pay the costs of the case stated, to be taxed within the limit prescribed by the rules.

GIBSON J.:—

The decision in *Connors* v. *Pearson* (1) rules this case, where the evidence is much weaker. The plaintiff made no statement to the police, and the main reason for forcibly detaining him was that, having been sent for and brought to the barracks, it would not have been safe for the plaintiff not to be under police protection. The feelings excited by Mr. Milling's murder may have warranted reasonable grounds of apprehension of criminal attacks on anyone in communication with the officers of law, but belief on reasonable grounds of future danger does not justify arrest, still less imprisonment. The successful demurrers in *O'Kelly* v. *Harvey* (2) decide this, if authority was wanting. Neither the Judge's conclusions of fact nor the evidence afford any legal answer to the action.

GORDON J.:—I concur.

H. J. M'C.

(1) Supra, p. 51. (2) 10 L. R. Ir. 285; 14 L. R. Ir. 105.

Fetherstonhaugh K.C., *W. S. Wylie K.C.*, and *Hugh Holmes*, for the appellant (Scott):—

The plaintiff was in danger, and the defendant was entitled to arrest and detain him in order to protect him from that danger, and thereby preserve the peace. FitzGibbon L.J., in *Coyne* v. *Tweedy* (1), said: "It is too late, at least in Ireland, to question the power of a constable, as a reasonable exercise of his duty to preserve the peace, to put a person into a safe place who is not himself a wrongdoer, but who, if not removed, will become the subject of a breach of the peace." Hayes J., in *Humphries* v. *Connor* (2), the "orange lily case," in dealing with the duty of a constable, said that "he is not only at liberty but is bound to see that the peace be preserved," and that "he is to do everything that is necessary for that purpose, neither more nor less." This passage was cited with approval by Sir P. O'Brien C.J. in *Coyne* v. *Tweedy* (1), who added: "The measure, then, of the defendant's duty is doing what was, and what he believed to be, reasonably necessary for the preservation of the peace." O'Connor L.J. referred to *Timothy* v. *Simpson* (3).

In *O'Kelly* v. *Harvey* (4) it was held that it is the paramount duty of a magistrate to preserve the peace unbroken by any means available for the purpose.

Leonard K.C. (*Bewley* with him), for the respondent:—

The appellant may have bona fide believed that the plaintiff was in danger, but that is immaterial if, as we contend, there was no legal justification for the detention of the plaintiff: *Sinclair* v. *Broughton* (5). The cases cited on behalf of the appellant do not establish any such far-reaching proposition as that an innocent person may be arrested and kept in detention for weeks against his will, solely on the ground that the police are apprehensive concerning his safety. This is subversive of the 29th Article of Magna Charta. The plaintiff has fully discharged the onus of proof laid on him by proving his imprisonment, while the defendant

(1) [1898] 2 I. R. 167, at pp. 202-3.
(2) 17 I. C. L. R. 1.
(3) 4 L. J. Ex. 81.
(4) 10 L. R. Ir. 285; 14 L. R. Ir. 105.
(5) 47 L. T. N. S. 170.

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has wholly failed to discharge the onus of proof laid on him, namely, the proof of facts justifying the arrest. There was no evidence adduced that the plaintiff was in any way connected with the murder, or that he had made any statement to the police, and it is the merest speculation that he was ever in danger.

O'Connor M.R.:—

This is an appeal from an order of the King's Bench Division, deciding in effect that on the facts proved there was no defence to a proceeding brought by civil bill for illegal arrest and false imprisonment. The plaintiff in the civil bill is a boy named John M'Laughlin, an infant, suing by his next friend. The defendant is Victor Henry Scott, a District Inspector of the R.I.C. The plaintiff lives in the town of Westport, and on the 3rd of April, 1919, he was brought by police to the barracks and detained there for some time, and afterwards at Castlebar and Dublin, until he was released. The boy had committed no crime, and the only justification put forward for his detention was that if he were allowed to go at large his life would be in danger, because he had been seen going to the police barrack and communicating with the police.

This is certainly a novel defence. I believe there is no precedent for it. It amounts to this: that any member of the community may be arrested and detained in prison because it is believed by a peace officer that his life is in danger. The consequences of such a doctrine are rather startling. Take the case of a jury bringing in a verdict of guilty. It is believed by the police, and possibly with good reason, that their lives are in danger in consequence of the odium incurred among a disaffected part of the populace, and the jurymen are accordingly arrested. There is no essential difference between such a case and that which is before us.

The only authorities cited in support of the defence put forward were *O'Kelly* v. *Harvey* (1), *Humphries* v. *Connor* (2), and *Coyne* v. *Tweedy* (3); but in each of these cases the arrest was

(1) 10 L. R. Ir. 285; 14 L. R. Ir. 105.

(2) 17 I. C. L. R. 1.

(3) [1898] 2 I. R. 167.

justified by the danger of an imminent breach of the peace. None of these cases is an authority for the proposition, essential for the defence in the present case, that a belief that the danger of a breach of the peace against the person at some future and indefinite time is a legal justification for the arrest and detention of that person, no matter how laudable the motive of the person effecting it. In my opinion the appeal should be dismissed.

RONAN L.J.:—

In this case I delivered a very long written judgment dealing minutely with the special facts of the case and the statements in the case stated. I arrived at the conclusion that, if I had to decide the case, I should have remitted it to Dodd J. for further information and explanation.

So far as the question whether the evidence was sufficient to support the findings, it seemed to me that the case of *MacCormack* v. *Courtney* (1) was an express decision that on a case stated under 27 & 28 Vict. c. 99, by a Judge of Assize, the Court has no power to give an opinion as to this. I carefully examined the case of *MacCormack* v. *Courtney* (1) and the statutes, and came to the conclusion that we should not overrule the unanimous judgment of four Judges without hearing the question argued. I expressed no opinion as to whether the judgment was right. I only found the case after the argument. It will be seen that the Order of the King's Bench Division in the present case is carefully confined to this: that there was no evidence to support any of the findings but the first, and that this did not amount to a justification. I examined the case stated minutely, and I came to the conclusion that the real substantial ground of the decision was rested on the facts which, in the words of Mr. Fetherstonhaugh's argument, "were assumed by both sides to be in the knowledge of the Court." It seemed to me obvious that we should have some information from the Judge as to what these facts were. It was a civil action, and it seemed to me from the case stated that the strict law of evidence was not insisted on, and that the case proceeded on the

(1) [1895] 2 I. R. 97.

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basis of the Judge's special knowledge of the facts and circumstances not appearing on the case stated (1).

O'CONNOR L.J. concurred for the reasons stated in his judgment in *Connors* v. *Pearson* (2).

Solicitors for the plaintiff Connors: *Little, Doyle, & Woods.*
Solicitor for the plaintiff M'Laughlin: *John Kelly.*
Solicitor for the defendants: *The Chief Crown Solicitor.*

R. ST. J. C.

(1) [I think this note of my judgment sufficient to indicate its general effect, and that it would be unreasonable to report it at length.—S. R.]

(2) Supra, p. 51.

JOHN O'CONNELL, MARY O'CONNELL, AND CATHERINE O'CONNELL, *v.* THE COUNTY COUNCIL OF TIPPERARY (SOUTH RIDING) (1).

Appeal.
1920.
May 17, 18.
June 3.

(1920. No. 474.)

Malicious injury—Death of murdered person—Compensation—Statutory next-of-kin — Persons entitled to compensation — Mode of assessing compensation—9 Geo. 5, c. 14.

Where compensation is payable under the Criminal Injuries Acts (9 Geo. 5, c. 14) in respect of the death of a murdered person, the right to share in such compensation is not confined to the statutory next-of-kin of the deceased, but the County Court Judge or Judge of Assize has in each case full judicial discretion as to the persons who are to benefit.

No definite rule for the assessment of compensation in such a case can be laid down, but the Court must determine in each case, considering all the circumstances in a just, generous, and reasonable spirit, what is the full compensation to be awarded.

CASE STATED by Kenny J. at the Spring Assizes, 1920, for the Co. of Tipperary, at Maryborough.

The facts of this case, which were not in dispute, and which were found by me, are as follows:—

1. Patrick O'Connell was a member of the R.I.C., stationed at Tipperary. He was murdered while on duty escorting a cart containing gelignite to the Soloheadbeg Quarries, three miles from the town of Tipperary, and within Tipperary No. 1 Rural District Council.

The said Patrick O'Connell was aged about 36 years at the date of this murder, and was a bachelor, and had thirteen years' service in the R.I.C. He left as his statutory next-of-kin the applicant, John O'Connell, his father, an old man of 70 years of age, living in Cork, in a small farm of about 11 acres. The deceased constable used to allow to his father the yearly sum of £20. The County Court Judge awarded £1,300 as the amount of compensation, the same to be paid to the said John O'Connell.

(1) In the Court of Appeal, before SIR JAMES CAMPBELL C., MOLONY C.J., and RONAN and O'CONNOR L.JJ.

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The deceased constable also left two brothers; one is a constable in the R.I.C., and the other lived on the farm with the father, and assisted him in the work of the farm; he had also two sisters, who also resided with the father on the said farm. All the brothers and sisters are of full age.

At the date of his death, the deceased constable was in receipt of pay of £109 4*s*. a year, and was also in receipt of war bonus and allowances, which brought his pay to £142 3*s*. It was proved that the pay of constables of the R.I.C. had been increased since the 1st April, 1919, and that if the deceased had not been murdered he would now have been in receipt of £234 a year; and he would, on retirement after thirty years' service, have been entitled to a pension of two-thirds this amount—viz., £156.

The capitalized value of the pay receivable by the deceased up to the completion of thirty years' service at the new rate of £234 a year would be £2,668. The capitalized value of the pension of £156, treating it as a deferred annuity, to arise on retirement after thirty years' service, would be £749. It was also proved by the same actuary who proved the foregoing figures that, assuming that the deceased constable would, on retirement, take up some civil employment, and reckoning the value of same at £1 a week, the capitalized value, treating it also as a deferred annuity, would be £250. Those three capitalized figures amount altogether to a gross total of £3,667. It was admitted that some deduction should be made for expenditure in connexion with the deceased constable's personal upkeep. For the County Council it was submitted that the deduction should be one-third, and by the applicant one-sixth.

The same actuary also proved that the capitalized value of the £20 a year payment made to the father by the deceased would be £140, or, say, seven years' purchase.

2. The County Council argued that the only compensation that was payable was the actual loss suffered by the father, who was the sole next-of-kin, and the only person proved to have been in receipt of benefits from the deceased, and that only to the extent of £20 a year, and that the utmost that would be awarded was £140, the figures already referred to and proved.

3. It was argued by the applicants that the compensation to be awarded did not depend solely on dependency of the

next-of-kin, or the loss of benefits received from the deceased, but was to be calculated on either—1, the loss to the estate sustained by reason of the murder; or, 2, the value of the pay and emoluments, valued as if same appertained to an office of which the deceased had been compulsorily dispossessed; or, 3, what was fair and reasonable, having regard to all the circumstances of the case, and not limited to the actual extent and value of the applicant's dependency upon the deceased.

I was of the opinion, for the reasons stated in my judgment in this and in *M'Donnell's Case* (1), both of which are set out in the schedule hereto, and which I delivered at Maryborough on the 16th March, 1920, that the only person to be compensated was the father as the sole next-of-kin, and that the measure of his compensation was the pecuniary loss he had sustained by the murder of his son, from whom future pecuniary benefit might reasonably have been expected. This loss on the basis of £20 a year, being the contribution made by the deceased out of the pay he was receiving at the time of his death, amounted to £140. If the constable had lived, his pay would have been considerably greater, and I therefore considered it would be just and reasonable to assume that the deceased would if he had lived, have increased his contribution to his father, and I therefore fix the award at £200.

The applicant duly served a requisition for special leave to appeal by case stated, and I gave the necessary leave, and state this case accordingly. The judgments set out in the schedule are to be deemed to be incorporated with and to be part of this case, as also are the preliminary notice and notice of application served on behalf of the applicant.

The question for the Court is:—1, Was I right in assessing compensation solely on the basis of the pecuniary loss suffered by the next-of-kin; 2, or (*a*) should such compensation have been measured by the loss the estate of the deceased has suffered by reason of the murder; or (*b*) should the loss be calculated on the value of the pay and emoluments of the deceased, valued as if same appertained to an office of which the deceased had been compulsorily dispossessed, and in both (*a*) and (*b*) subject to a deduction for the deceased's own upkeep?

(1) Infra, pp. 106, 108.

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If 1 is answered in the affirmative, my order on appeal is to stand affirmed. If 1 is answered in the negative, and either 2 (*a*) or 2 (*b*) is answered in the affirmative, the award of the County Court is to stand affirmed.

In any case, I decree that any sum awarded is to be levied exclusively off Tipperary Urban and Tipperary No. 1 Rural District Council, and the applicant, John O'Connell, is to be entitled to the following costs and expenses, viz. :—Costs in County Court, £76 15*s.* 8*d.* ; expenses, £7 19*s.* 6*d.* ; costs of appeal, £16 ; expenses, £14 10*s.*—£115 5*s.* 2*d.* Dated this 29th day of April, 1920. (Signed), W. Kenny, Judge.

Schedule.

Judgment of Kenny J. in *O'Connell's Case.*

John O'Connell, Mary O'Connell, and Catherine O'Connell v. *The County Council.*

This is the case of the second constable who was murdered in the course of his duty at Soloheadbeg, on the 21st January, 1919. The claim in this case was for the sum of £2,500, and it was made on behalf of three parties as next-of-kin of the deceased. It now appears that only one of them, namely, John O'Connell, is the statutory next-of-kin, he being father of the murdered constable, to whom the deceased allowed a sum of £20 a year out of his pay. The County Court Judge awarded a sum of £1,300, which he directed to be levied off the South Riding, and paid to the said John O'Connell.

The deceased was aged thirty-seven years at the date of his death, and had thirteen years' service in the force. His pay under the new scheme of pay and pension would be £234 ; under the old regulation it was only £109 4*s.* He would have been entitled to retire on a pension of two-thirds of his pay after thirty years' service. The capitalized value of his pay of £234 was stated to be £2,668, and that of his pension £749, while, as in M'Donnell's case, the actuary brought into the account what he considered the deceased might have earned in civil employment, after his pension came into being, and which he capitalized at £250. If one-sixth for upkeep be deducted from the total of the three capital sums, namely, £3,667, it will leave the claim at

£3,056, while, if more than one-sixth be deducted for upkeep, the figure of £3,056 must be further reduced. In these circumstances, the question arises whether the claimant, the father, is entitled to a fuller amount of compensation than would be represented by proper, just, and reasonable appraisement of the value of the pecuniary injury resulting from the death, that is, whether he would be entitled to more than the value of the pecuniary benefit he might reasonably have expected to derive from his relation to the deceased had the latter not met his death prematurely. I have already dealt with this question in the case of M'Donnell, the other murdered constable, but it arises in a more direct form in the present case.

The Act of 1919 bristles with points. I deal only with the case of murder. The first sect., sub-s. 2, provides that application for compensation, or, in the words of sub-s. 3, "full" compensation, may be made by the personal representative, or any of the next-of-kin of the deceased, or by the Attorney-General, or any person authorized in that behalf by him; and any compensation awarded is to be paid or distributed to or amongst such person or persons in such shares and proportions as the Judge may determine. The third sub-section indicates what one would prima facie consider an unnecessary instruction, namely, that the sum awarded is to be just and reasonable. Various questions suggest themselves in connexion with this first section. Is there a difference between compensation and full compensation? On what basis is compensation to be fixed? To whom is so much of the compensation as is represented by the latter to be paid, and how is it to be applied? If a personal representative obtains compensation, does he occupy the position merely of a trustee for others, and, if so, for whom? Must the cestuis que trusts be persons who have sustained pecuniary damage by the death, and, if not, what becomes of the amount decreed? If one of the parties claiming obtains a benefit by the death beyond that derived by others—such as a widow's pension—is credit to be given for that benefit, and, if so, is it a credit against the whole sum awarded, or only against the share of the particular individual? In what class of case can the Attorney-General take the initiative, and on whose behalf? Are

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the next-of-kin referred to in the section the statutory next-of-kin; and has the Judge power to order payment of any part of the compensation to persons other than those who make formal application, or other than those who have sustained pecuniary injury by the death or other than statutory next-of-kin? These are all interesting points which may, probably, have to be discussed in some of the many cases likely to arise at sessions and assizes.

In the present case, I express an opinion only on that relating to the necessity of establishing pecuniary loss. As I stated in M'Donnell's case, I am of opinion that the claimant must satisfy the Court that he has suffered a pecuniary loss by reason of the death of one from whom future pecuniary benefit might reasonably have been expected. The injury to the estate of the deceased, as contended for by Mr. Gibson, is not in my judgment the description of loss contemplated by the statute. Such injury could not possibly be the subject of compensation for injury to the claimant. Here the claimant was in receipt of only £20 a year from the deceased, the capitalized value of which, having regard to the various contingencies, was estimated by the actuary at about seven years' purchase, namely, £140. That allowance by the deceased was made when he was in receipt of only £109 4*s.* a year pay. It is not improbable that had he lived to receive the increased scale, that allowance might have been increased, and I therefore think I am justified in allowing a sum of £200 as reasonable and fair, both to the applicant and to the ratepayers, having regard to the opinion at which I have arrived, and to the meaning of the section. I accordingly reduce the amount awarded by the County Court Judge to £200.

As in M'Donnell's case, I alter the area of levy, and place the amount on the Urban District of Tipperary and Tipperary No. 1 Rural District.

Judgment of Kenny J. in *M'Donnell's Case.* Tipperary, S.R. No. 20. *M'Donnell* v. *County Council.*

This was an application by the next-of-kin of a constable in the R.I.C., who was murdered at a place called Soloheadbeg, in this county, on the 21st January, 1919. The claim was for £5,000, and the County Court Judge awarded £1,500, to be

distributed amongst certain of the next-of-kin, in the manner provided by his order.

The murdered constable was a widower; he left seven children, namely:—James M'Donnell, aged twenty-eight; Elizabeth M'Donnell, aged twenty-five; Eileen M'Donnell, aged twenty-three; Christopher, who will be twenty-two in September next; Bridget, aged eighteen; Joseph, aged fifteen; and Alphonsus, over eleven.

The deceased was an exceptionally strong, healthy man, who had been in the force from the year 1882, and who, at the date of his murder, was aged fifty-five. There was evidence before me that he was seldom on sick leave, and that his record in this respect was somewhat remarkable.

Under the Criminal Injuries (Ireland) Act of 1919, within the provisions of which this claim admittedly comes, the Court is to award compensation in respect of the murder, but no indication is afforded by the statute as to the principle on which such compensation is to be ascertained, save that it is to be, according to sect. 1, sub-s. 3, such a sum as the Judge thinks will be "just and reasonable," with power to him "to make a decree for full compensation." What the meaning of "full" compensation may be, as contrasted with compensation divested of the adjective, I am unable to conceive; and I propose to deal with the claim as one in which the applicants should be awarded such sum as I may think just and reasonable. "Just" and "reasonable" are, however, relative expressions, and must, in my opinion, be regarded solely in their connexion with the pecuniary injury which the claimants have sustained by reason of the death of one from whom future pecuniary advantages might reasonably have been expected. In that sense and with that limitation I am of opinion the Judge should approach the consideration of the claim. The Act was, I think, intended to give the Court a wider discretion as to the amount to be awarded; but such discretion must be bounded by some sort of principle, and I think the latter may, perhaps, be expressed by saying that the sum awarded should represent a full money equivalent for the pecuniary injury to the claimant that resulted from the death. In ascertaining the amount of that money equivalent, the test applied in cases under Lord Campbell's Act

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seems to me to be appropriate, and the question of reasonable expectation of pecuniary advantage should be that which should govern cases under the Act of 1919. I cannot conceive any state of circumstances which would entitle a claimant who brings himself within the Act to recover larger compensation than would be represented by his pecuniary loss. With reference to claims for injury to property, I understand that in a recent case in the Court of Appeal, which came before it on a "case stated" by myself, it was decided that no compensation in the nature of exemplary or punitive damages could legally be given against the County Council; but the question was not decided as to whether such a class of damage could be awarded in the case of injury to the person. I was not asked to give an opinion on the point in this case, as no claim was founded on any such consideration.

If my view of the meaning of the statute be right, I have merely to consider on this branch of the case what sum would be a proper money equivalent for the pecuniary loss suffered by members of this family. The eldest son, James, at the time of his father's death, was doing for himself. He has a lucrative position in the great shipbuilding firm of Harland & Wolff, in Belfast, and is a married man. I have not heard of any pecuniary advantage he would be likely to have derived from his father had he lived; but I am relieved from giving a decision in his case, inasmuch as he has renounced all claim to benefit under an award. As to the others, the daughter Elizabeth is not in robust health; Eileen is the housekeeper, and looks after her younger brothers and sisters; Christopher is a cripple, who had learned the trade of bootmaking, but was driven from the pursuit of it in this county, and had to migrate to the west of Ireland; Bridget is an assistant in a shop; Joseph is with his eldest brother in Belfast; and the remaining boy, Alphonsus, is at home. Now, it seems to me that all these children of the deceased except the eldest might well claim to have a reasonable expectation of pecuniary benefit from their father had he not been prematurely taken away; and I hold, accordingly, that they have brought themselves within the spirit and interpretation of the statute as next-of-kin who have suffered loss, and are entitled to compensation, each one according to the loss suffered by him or her. The County Court Judge has, with

the consent of all the adult members of the family, fixed the proportions in which he considered they should take whatever amount was awarded, and I see no grounds for differing from that apportionment.

Now, as to the amount which the family as a whole are entitled to, the evidence shows that at the date of the murder there was in force for members of the R.I.C. what may be now called the old scale of pay and pension. That scale has been recently altered, and, so far as I can judge, effectually altered, though formal official sanction has not yet been given to it, and though it might undergo alteration in case the cost of living were in the future to undergo a decrease. In my opinion, the new scale is applicable for the purpose of ascertaining the financial ability of the deceased had his life not been cut short, and the evidence shows that in the present year he would as an ordinary constable have been in receipt of £234 a year pay, and to a pension of £156 6*s.* 8*d.* on retirement, being two-thirds of his pay. He could have retired at any time, having regard to the length of his service, and if he desired he could have remained in the service up to the year 1922, when he would have completed forty years It was proved by an actuary that the capitalized value of the pay would be £1,008, and that of the pension £1,141, the two amounting to £2,149. The actuary also deposes to the probability of the deceased had he lived being able, when he entered on his pension at the age of sixty or sixty-one, to supplement it from civil employment, which he estimated at about £1 a week, the capitalized value of which, according to actuarial tables, he stated to be £380. The three capital sums amount to £2,529, but it is admitted that a sum reasonably equivalent to the upkeep of the deceased must be deducted from this sum, and it is submitted that one-sixth, equal to £421, would be the proper deduction. This would leave the claim at £2,108. If, as has been suggested by the County Council, the one-sixth is an inadequate credit, and that one-third would be more reasonable, the claim would be reduced to £1,686. While I consider this reduction of one-third too large, there are so many contingencies in cases of this sort to be taken into account that I do not feel at liberty to increase the amount awarded, and the figures and facts of the case forbid any

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reduction of the amount. The latter was arrived at by a careful and discriminating Judge, whose decision ought not to be lightly interfered with; and counsel for the County Council admits the sum to be correct if the higher rates of pay are to be the groundwork. I therefore affirm his award of £1,500, and the only alteration in this portion of his order will be that Christopher's share will be paid to him and not lodged in Court, as he is not an infant; and the eldest son, Mr. James J. M'Donnell, will be associated with Mr. Daniel Murphy for the receipt of the income of the infants' shares, and the application of such income for their benefit.

As to the area of levy, the County Court Judge has placed it on the whole of the South Riding. The murder was committed in Tipperary No. 1 Rural District. Crosses which the family of the murdered man had erected to his memory were removed immediately after they had been erected; the car which the murdered constable was assisting to guard and which was taken away was found in the district; no help of any sort was offered by the people in the locality; and, finally, the deformed boy, Christopher, was, by the treatment he received, obliged to leave the locality altogether. In these circumstances, I consider that the district as a whole urban and rural district should bear this levy, and that it should not go on the whole of the South Riding. The levy will be on the Tipperary Urban District and Tipperary No. 1 Rural District.

The applicants appealed to the Court of Appeal.

Gibson K.C., *Wylie K.C.*, and *Devitt*, for the appellants.

Sealy K.C. and *J. P. Kenny*, for the Tipperary County Council (South Riding).

Carrigan K.C. and *Kinahan*, for the Tipperary No. 1 Rural District Council.

C. Power, for the Tipperary Urban District Council.

SIR JAMES CAMPBELL, C.:—

An Act to amend the enactments relative to compensation for criminal injuries in Ireland was passed upon the 16th April, 1919. Sect. 1, sub-s. 1, reads: "The provisions of the Criminal Injuries Acts with respect to the compensation of persons maimed, and of the representatives of persons murdered in certain cases, shall, subject to the modifications made by this section, be extended so as to apply in the cases mentioned in clauses (*a*) and (*b*)." The material words of sub-s. 2 for the present purpose are: "The application may be made in the case of murder by the personal representative or any of the next-of-kin of the deceased, or by the Attorney-General for Ireland, or any person authorized in that behalf by him, and any compensation awarded in the case of murder shall be paid or distributed to or amongst such person or persons in such manner, shares, or proportions as the County Court Judge or Judge of Assize shall determine." In this particular case we are compelled to determine, 1, the subject-matter for which compensation is to be given, and, 2, the persons to whom such compensation is or may be awarded.

Under sect. 106 of the Grand Jury Act (6 & 7 Wm. 4, c. 116), jurisdiction was given to the Grand Jury where a witness, magistrate, or peace officer has been murdered under certain conditions, to present for such sum or sums of money as they should think just and reasonable to be paid to the personal representative. It will be seen that by this section there is no reference to compensation, nor any guidance given as to the principles upon which the award is to be based, or as to what is to become of the amount once it is paid to the personal representative, and if it stood by itself it might support the inference that the money was assets, with all the legal incidents resulting therefrom.

There is little authority to help us in the construction of this sect. 106, largely due to the fact that, as the result of judicial decision, its operation was restricted within the narrowest limits; but what authority there is seems to me to support the conclusion that the money was not asssets of the deceased, but was to be held by the personal representative in trust for the persons who

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sustained loss through the murder. The only reported case which has been cited, or which I think can be found, gives little assistance, because it was decided upon the form of the presentment, by which the Court held itself bound. I refer to *In re Martin* (1), in which the Grand Jury, upon an application under the section on behalf of the widow and administratrix of the murdered officer, presented to her in terms as the widow and personal representative, £4,000 as compensation for the loss she sustained by reason of the murder of her husband. The Master of the Rolls, holding, as I have said, that he could not go behind the presentment, decided that it was a personal award to the widow as compensation for her loss, and not, therefore, assets of the deceased; but he states in his judgment that there can be little doubt that the Legislature intended money presented under this section to be compensation.

A close analogy to the provisions of this Act of 1919 is to be found in the Prevention of Crime (Ireland) Act, 1882 (3), which, by sect. 19, empowered the Lord Lieutenant under certain conditions to award such sum for compensation as he might think just in cases of agrarian murder to the personal representative of the person murdered; but the section further provides that applications under the Act may be made by the personal representative, or one of the next-of-kin of any person murdered, or by a Crown Solicitor, or by any person in that behalf authorized by the Lord Lieutenant. In *Herbert* v. *Hungerford* (2) it was held by this Court, overruling the King's Bench, that the amount awarded could not be treated as general assets, and that, while the personal representative received the money virtute officii, his duty was to distribute it as compensation amongst the persons upon whom the loss had fallen. This Act of 1919, with which we have to deal, expressly treats the money awarded under sect. 106 of the Grand Jury Act as "compensation," and makes compensation throughout as the basis of all sums to be awarded under its modifying and extending provisions, and I have therefore no hesitation in holding that such sums are not assets, and do not represent in whole or in part the estate of the deceased,

(1) L. R. Ir. 23, at p. 413. (2) 20 L. R. Ir. 100.
(3) 45 & 46 Vict. c. 25.

but are compensation for the persons who may be found to have sustained loss by his murder.

The next question is as to the persons entitled to this compensation, and while it has been contended upon behalf of the applicants that they are such person or persons as may be determined by the Court, the appellants, on the other hand, assert that they are limited to the next-of-kin, as determined by the Statute of Distributions. For this purpose they contend, if, as I hope, I am correctly interpreting their argument, that they were so limited under the previous legislation, and that the Act of 1919 only extends this legislation in the way to be found in sect. 1, sub-s. 1, clauses (*a*) and (*b*), which admittedly are confined to other matters.

I am satisfied that they are not justified in assuming that any such limitation is to be found in the antecedent legislation. Section 106 of the Grand Jury Act is silent on the subject, and the Grand Jury were left at large, save in so far as was held by the Master of the Rolls in *In re Martin* (1), that their award was to be based upon compensation; but under the Prevention of Crime Act, 1882, I think it to be clear from the provision enabling applications to be made by the Crown Solicitor or any person authorized by the Lord Lieutenant, as well as by the personal representatives, or any one of the next-of-kin, that the Lord Lieutenant was given an unlimited discretion in his determination as to the persons to whom compensation might be made. Nor do I agree that the law is only extended by the Act of 1919 by the matters contained in Clauses (*a*) and (*b*). It has recently been decided by this Court that the powers of apportionment of the levy as between adjoining counties or districts, conferred by the last paragraph of sub-s. 2, are in addition to and not in substitution for the powers conferred by sect. 140 of the Grand Jury Act, and the power conferred by sub-s. 3 to award full compensation must have been regarded as an extension. The applicants further contend that in any event an express limitation is to be found in the words of sect. 1, sub-s. 2, and that the words "such person or persons" are not to be read with the words which follow them, but as referring to the persons previously enumerated, that is to say, the

(1) L. R. Ir. 23.

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personal representative, any one of the next-of-kin, the Attorney-General, or any person authorized by him. If this is the true construction of the sub-section, it would necessarily follow that amongst the persons to whom the compensation may be paid, either in whole or in part, are the Attorney-General, and any person authorized by him to apply; but to meet this objection it is suggested they would hold the money in trust for the next-of-kin. Why their names should have been inserted for this purpose so long as any of the next-of-kin are themselves entitled to apply, it is not easy to see, and I think it certain that they have been inserted in order to enable the machinery of the Act to be put in motion for the benefit of persons other than the next-of-kin. If the sub-section read "and any compensation to be awarded in the case of murder shall be paid or distributed in such manner, shares, or proportions, to or amongst such person or persons as the County Court Judge or Judge of Assize shall determine," the construction contended for would be impossible, and the mere fact that in the section as drafted the words "such person or persons" precede instead of follow the words "in such manner, shares, or proportions," does not necessarily alter its meaning. The list of persons entitled to apply is practically the same under the Act of 1882, but once the Lord Lieutenant has been put in motion by a prescribed applicant, his discretion in the selection of the persons to receive the compensation is apparently unlimited. In *Herbert* v. *Hungerford* (1), FitzGibbon L.J. says: "As it is described as a sum awarded for compensation, and must be paid after investigation of all the circumstances, it is clear that there may be many cases in which the loss to the compensated will not have fallen especially upon the next-of-kin." He also points out that in the Act of 1882, as in this Act of 1919, the widow is omitted from the list of those entitled to apply, and we are not at liberty to supply this omission, as has been suggested, by reading the words "next-of-kin," as the persons entitled under the Statute of Distributions. They are never so construed, unless it is expressly so stated, or unless from the context such construction is to be inferred, and there is nothing to raise such an inference in either of the Acts. But the

(1) 20 L. R. Ir. 100.

case of the widow is only one example of the many persons to whom FitzGibbon L.J. refers, whose loss as the result of the murder may substantially exceed that sustained by any of the next-of-kin. If the victim was a bachelor, who died intestate and illegitimate, or with no ascertainable next-of-kin, it is not only possible but probable that he would leave behind him persons connected by the ties of nature or friendship who had been in whole or in part dependent on his bounty for their subsistence. There are also the cases of illegitimate children, or the orphans of relations or friends, whom the deceased may have treated or adopted as members of his family and household. Again, he may have been the sole or main support of his father or widowed mother and his sisters, and maintained them in the same house with himself or elsewhere; but, if his next-of-kin alone are entitled to compensation, his sisters may be left destitute, or the relatives of his deceased wife, after years of dependence on his bounty, might share the same fate.

If, for example, in the present case, this constable had been the sole support of his father and his two sisters, and if the father had been aged eighty-four at the date of the murder of his son, he would, as the sole next-of-kin, have been entitled to get nominal compensation, and the sisters could get nothing. In the case of malicious injury to property compensation may be awarded to any person injured, and I see no reason why under this Act it should not similarly be awarded to any person who has suffered loss by the murder of the deceased, subject always to the existence of some relation of dependency between the parties So restricted, it will necessarily be confined, in the majority of cases, to the persons entitled under the analogous machinery of Lord Campbell's Act, or to dependents, as entitled under the Workmen's Compensation Acts; but there will remain exceptional cases, in the circumstances which I have previously indicated, with which the tribunal in its judicial discretion will be entitled to deal. In the result, the sub-section in question must, in my opinion, be read as first prescribing the persons by whom the application may be made, and next as providing that on the hearing of the application the Court shall pay or distribute the compensation in such manner, shares, and proportions as it may

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determine, to such person or persons as in its judicial discretion it selects.

Finally, as to the measure and amount of the compensation in any particular case, I am of opinion that, subject to certain general principles, it is left, and designedly left, by the Legislature to the good sense and experience of the tribunal whose duty it is to fix it. Being awarded as compensation, it should not, for the reasons recently explained by this Court in cases of malicious injury to property, include what is generally described as vindictive damages, though the fact that death has been due to the foulest of crimes is plainly responsible for the provision that the compensation may be full, and not merely just and reasonable, which I interpret to mean that, while it should be just, it should also be generous. It should substantially be based upon pecuniary loss, immediate or prospective; but this in no sense means that it must necessarily be capable of mathematical measurement in so many pounds. If the murdered man was the father of a family of young children, or the head of a household, depending upon his earnings or income, the break-up of the home, the loss to the widow and children, of the head of the house, of the education he would have provided for the children, of the means and opportunities for being started in life, endowed on marriage, or helped in times of pecuniary embarrassment, are all elements proper for the consideration of the tribunal: see *Pym* v. *Great Northern Railway Co.* (1), a case under Lord Campbell's Act. I am also in agreement with the view, as I believe, of my colleague Lord Justice Ronan, that in the case of the widow, the loss of consortium, or nervous or physical break-down, through grief or shock, should be generously estimated; but we have not to decide this question upon the facts of the present case. Regard must be had to the average duration of life, to any uncertainty that may reasonably be suggested, owing to the particular relationship between the parties, as to the period for which the bounty of the deceased might be prolonged, to the possibility, in the case where the deceased was a bachelor, of it ceasing on his marriage, or under other conditions, to the possibility of its increase by reason of the profession, industry, or

(1) 4 B. & S. 496.

business in which the deceased was engaged. These and similar considerations, which I do not profess to have exhausted, make the problem both difficult and responsible for the tribunal; but the learned Recorder of Dublin, with a longer and more varied experience in dealing with this question than that, perhaps, of any other member of the present Judiciary, has succeeded in solving it with singular success by the application of his robust commonsense.

It remains to consider the application of these principles which I have sought to explain to the present case, in which the facts, so far as they are stated, are as follows:—The victim was Patrick O'Connell, a constable in the Royal Irish Constabulary. At the date of his murder he was aged thirty-six, and had thirteen years of service. His pay and emoluments at the time amounted to £142 for the year, but had he lived it would now be £234. He had two unmarried sisters and a brother, who have always lived with their father and assisted him in the working of a small farm of some eleven acres. The deceased had regularly contributed the annual sum of £20 to his father, who had used it presumably for the upkeep of the home. His brother made no claim, and the applicants were his father and the two sisters; and Kenny J., in confirming his award to the father, fixed the amount at £200, which he arrived at in the following way:—He assumed, as I think most properly, that the deceased would not only have continued to contribute this £20 yearly during the lifetime of his father, but also that he would, upon his pay being increased to £234, have enlarged this contribution by an additional amount, which he measures at £10. He then adopts the ordinary actuarial methods, which take eighty-four as the maximum age, and arrives at the average age or duration of life by halving the number of years by which the age of the party concerned falls short of eighty-four. The father being seventy years of age, is thus given a further seven years of life, for which he allows him £20 for the year after his son's death, for which his pay would remain unaltered, and £30 for each of the subsequent six years during which his pay would have been increased, making £200 in all. So far it is easy to follow him, but my difficulties begin when I turn to the copy of his judgment which he has appended

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to the case stated. In it he states that the Act of 1919 bristles with points, and gives a number of instances, some of which directly raise the precise questions with which I have already dealt; but then he adds that he expresses no opinion upon any of them, save as to the necessity for establishing pecuniary loss. But when we turn to the case he has stated we find that he has decided, as indeed he could not avoid deciding, the following further points, that the loss to be calculated was not the loss to the estate of the deceased, but to those who suffered as the result of his death, and that the right to compensation for this loss was limited by the Act to his next-of-kin. I may pass from the first of these conclusions, with which, for the reasons I have already given, I agree, but I hope that I have made it equally clear why I entirely dissent from his second proposition, which he states in these words: "I was of the opinion that the only person to be compensated was the father as the sole next-of-kin." We therefore decide that he was wrong in holding that the compensation was limited to the next-of-kin, and must answer each of the two questions submitted to us in the negative; but these answers must be read in the light of my previous observations.

In the result, as this case comes before us by way of appeal, we have to determine the amount to be awarded as compensation, and with the meagre evidence to be found in the case we should in ordinary circumstances have found it necessary to have the material facts brought more fully to our notice; but in view of the poverty of the applicants, and at the request of counsel for both sides, we have agreed to measure it to the best of our ability on the materials before us. We have asked for evidence as to the ages of these women, and in reply an affidavit has been sworn by the elder, in which she gives her own age as forty and that of her sister as thirty-eight.

In my opinion the duty of the tribunal is, in the first instance, to assess the whole of the compensation to be awarded, and then to determine the shares in which it is to be apportioned amongst the persons who are found to have suffered loss, in the sense already indicated, as a result of the murder. The members of the Court, with the exception of Lord Justice O'Connor, are agreed in fixing the total compensation at the sum of £500. We regard

the £20 a year contributed by the deceased constable as intended by him for the upkeep and assistance of his humble household. We hold it to be probable that, with his increased pay and prospect of promotion, this contribution would have been substantially increased. But against these considerations we set off the possibility of his contribution decreasing in the event of his own marriage, the marriage of one or other of his sisters, or the death of his father. We direct that this amount shall be apportioned as follows: £150 to the father and £175 to each of his two sisters.

MOLONY C.J.:—

Constable O'Connell was murdered while acting in the execution of his duty, and an application for compensation on behalf of the father and two sisters of the deceased was made to the County Court Judge in pursuance of the provisions of the Criminal Injuries Acts. It appeared that the constable was about thirty-six years of age at the time of the murder, and was a bachelor. His father, John O'Connell, was an old man of seventy years of age, living in the County Cork on a small farm of about eleven acres. The deceased also left one brother and the two sisters living on the farm, and another brother, also a constable in the R.I.C. It was proved that the deceased constable used to allow his father the yearly sum of £20 out of his salary, which, at the time of his death, including war bonuses and allowances, amounted to £142. Had he lived, however, until the 1st April, 1919, he would have been in receipt of a salary of £234 a year, and on his retirement, after thirty years' service, he would have been entitled to a pension of two-thirds of that amount.

The question which arises in the present case for determination is upon what principle the amount of the compensation is to be assessed, and the class of persons entitled to share in it?

Under s. 106 of the Grand Jury (Ireland) Act, 1836 (6 & 7 Wm. 4, c. 116), where any witness, magistrate, or other peace officer is murdered or maimed in the circumstances therein mentioned, it was declared lawful for the County Court of the county within which such murder or maiming should have been committed respectively "to make a decree for such sum or sums of money as the Court shall think just and reasonable, to be paid

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to the personal representative of such witness, magistrate, or peace officer so murdered, or to such witness, magistrate, or peace officer so maimed, having regard to the rank, degree, situation, and circumstances of such witness, magistrate, or peace officer, such money to be raised off the county at large, or the district in which such murder and maiming shall respectively have been perpetrated, at the discretion of the Court."

Under this section the money could only be paid to the personal representative of the murdered person; and it was held by Porter M.R., in the case of *Martin, deceased* (1), that money presented under this section to the widow and personal representative of a peace officer murdered in the discharge of his duty was not assets of the deceased husband, and that his next-of-kin were not entitled to any part thereof. This case was, however, decided mainly on the form of the presentment, and still left in doubt the class of persons who would be entitled to claim under the statute.

The question of the measure of the compensation was considered in the case of *Re Nolan's Presentment* (2), and it was held by the Court for Crown Cases Reserved that the Grand Jury were not obliged to award full compensation in the ordinary sense, but only such sum as they thought just and reasonable, having regard to the rank and position of the person injured.

Nolan's Presentment (2) was discussed, and followed by Palles C.B. in the case of *English* v. *The County Council of Kerry* (3), and by me in the case of *Leahy and another* v. *The County Council of Roscommon* (4), Spring Assizes, 1919; and up to 1919 it was clearly understood to be settled law that the sum which was to be given in pursuance of the section would not represent full compensation to the person maimed or to the representatives of the person killed.

The framers of the Act of 1919 had therefore before their minds the fact that full compensation could not be awarded, and also that there was some doubt as to the class of persons who would be entitled to benefit when the personal representatives had recovered the amount (see observations of Porter M.R. in *In re Martin* (5)).

(1) 23 L. R. Ir. 413.
(2) 24 I. L. T. & S. J. 623.
(3) 34 I. L. T. R., at p. 76.
(4) Unreported.
(5) 23 L. R. Ir. 413, at p. 416.

We have now to consider the effect of the Act of 1919 (1). Under sect. 1, sub-s. 1, the provisions of the Criminal Injuries Acts with respect to the compensation of persons maimed, and of the representatives of persons murdered in certain cases shall, subject to the modifications made by this section, be extended so as to apply to any of the following cases—namely, (*a*) where a judge, magistrate, police constable, member of the naval, military, or air forces, or the civil service of the Crown has been murdered, maimed, or maliciously injured in his person in the execution of his duty, or on account of his being acting, or having acted as a judge, magistrate, police constable, or member of such forces or service; (*b*) where any other person has been murdered, maimed, or maliciously injured in his person, and the murder, maiming, or injury is a crime arising out of any combination of a seditious character or any unlawful association.

There is no doubt but that the deceased constable came within this definition, and therefore, under sect. 1, sub-s. 2, the application might be made by the personal representative, or any of the next-of-kin of the deceased, or by the Attorney-General for Ireland, or any person authorized in that behalf by him. This extends the power of applying, which was formerly confined to the personal representative. But the section further provides that "any compensation awarded in the case of murder shall be paid or distributed to or amongst such person or persons in such manner, shares, or proportions as the County Court Judge or Judge of Assize determines."

In the present case the father was deceased's sole next-of-kin, and consequently he was a proper applicant, but it has been contended that the only persons entitled to benefit under the section are the statutory next-of-kin, and that no other case of dependency, no matter how great, is dealt with by the statute. I think it was to avoid the possibility of such a construction that the words which I have just quoted were introduced into the section, and that the object and meaning of the statute was that when the application was made in the prescribed manner, the Judge should have full judicial discretion as to the persons who were to benefit in the

(1) 9 Geo. 5, c. 14.

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distribution. Although, therefore, the father is in law the only next-of-kin, it was perfectly competent for the County Court Judge, or the Judge of Assize, if he in the exercise of his discretion thought fit, to extend the benefits of the compensation to the two sisters of the deceased, provided that they had suffered such a loss as could be compensated under the Act.

The question of the measure of the damages has next to be considered. Under sect. 106, as has been already pointed out, the Court is to make a decree for such sum as it should think just and reasonable, "having regard to the rank, degree, situation, and circumstances" of the deceased person. Under sect. 1, sub-s. 1, of the Act of 1919, it is specially provided that the power of a County Court Judge or Judge of Assize to make a decree "for such sum as he thinks just and reasonable shall include power to make a decree for full compensation." The intention and effect of this sub-section was to over-ride the case of *Nolan's Presentment* (1), and to enable the Court now to give full compensation in the ordinary sense. It is suggested that the mode of estimating damages in these cases under the 1919 Act is the same as under the Fatal Accidents Act, 1846 (9 & 10 Vict. c. 93), but an examination of that Act and of the cases under it will show that, while analogous in several respects, there are very material differences. Section 2 of the Act of 1846 enacts: "In every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought."

The effect of these words was considered shortly after the passing of the Act by Parke B. in *Armsworth* v. *The South-Eastern Railway Company* (2). That was an action brought on the statute by a widow on behalf of herself and children, and the learned Judge in summing up said: "A very great difficulty presents itself; for you cannot estimate the value of a person's life to his relatives. No sum of money could compensate a child for the loss of its parent; and it would be most unjust if whenever an accident occurs juries were to visit the unfortunate cause of it with the utmost amount which they think an equivalent for

(1) 24 I. L. T. & S. J. 623. (2) 11 Jurist, 758.

the mischief done. Here you must estimate the damage by the same principles as if only a wound had been inflicted. Scarcely any sum could compensate a labouring man for the loss of a limb, if you do not in such a case give him enough to maintain him for life; and in the present case you are not to consider the value of his existence as if you were bargaining with an annuity office; for in that view you would have to calculate all the accidents which might have occurred to him in the course of it, which would be a very difficult matter. I therefore advise you to take a reasonable view of the case, and give what you consider a fair compensation."

The effect of the same words was further considered by the Court of Queen's Bench in *Blake* v. *Midland Railway Company* (1), where it was held that in an action under this statute the jury in estimating damages could not take into consideration mental suffering or loss of society, but must give compensation for pecuniary loss only. Coleridge J. in giving judgment, referring to the section, said: "The measure of damage is not the loss or suffering of the deceased, but the injury resulting from his death to his family. This language seems more appropriate to a loss of which some estimate may be made than to an indefinite sum independent of all pecuniary estimate, to soothe the feelings, and the division of the amount strongly leads to the same conclusion."

In *Rowley* v. *The London and North-Western Railway Company* (2) the question of the measure of damages was also fully discussed, and Brett J., referring with approval to *Blake's Case* (1) and *Armsworth's Case* (3), and quoting the direction of Parke B., above referred to, said: "This seems to be in accordance with the general rule that in actions for tort for personal injury the amount of damages is entirely in the discretion of the jury, subject to the supervision of the Superior Court of law if unreasonably large or unreasonably inadequate. To the best of my belief the invariable direction to juries from the time of the cases I have cited until now has been 'that they must not attempt to give damages to the full amount of a perfect compensation for the pecuniary injury, but must take a reasonable view of the

(1) 18 C. B. (N. S.) 93. (2) L. R. 8 Ex. 221. (3) 11 Jurist, 758.

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case, and give what they consider under all the circumstances a fair compensation.' I have a clear conviction that any verdict founded on the idea of giving damages to the utmost amount which would be an equivalent for the pecuniary injury would be unjust. Founding my opinion upon that conviction, on the declaration of it by Parke B., and on the ordinary directions of Judges, which directions have not been for years challenged, I conclude that the direction I have enunciated is the legal, and only legal, direction."

Under the present statute the Court is to make a decree for "full compensation," and that enables the Court to do what, according to Brett J., they must not attempt to do in cases under Lord Campbell's Act, that is, to give damages to the full amount of a perfect compensation for the pecuniary injury. I am, therefore, of opinion that the measure of damages in the present case is not the same as under Lord Campbell's Act, although the tendency of modern decisions under that Act is more and more closely to approximate to giving full compensation for all pecuniary loss, actual or prospective: *Taff Vale Railway Company* v. *Jenkins* (1); *Berry* v. *Harmon & Co.* (2).

I do not think that it is desirable, or indeed possible, to lay down any very definite rules for assessing the compensation. Each case must depend upon its own facts, and the Court must determine, considering all the circumstances in a just and reasonable spirit, what is the full compensation to be paid to the applicant in each particular case.

I have had some difficulty in estimating the amount in the present case; but, on the whole, I have come to the conclusion that the amounts which have been stated by the Lord Chancellor are not unreasonable, though if I had been estimating the compensation by myself I would probably not have arrived at the same figures.

O'Connor M.R. expressed his concurrence with the judgment of the Lord Chancellor.

(1) [1913] A. C. 1. (2) [1915] 1 K. B. 627.

RONAN L.J.:—

I agree with the judgments of the Lord Chancellor and the Lord Chief Justice. The Crimes Act of 1882, sect. 19, sub-s. 3, says the Lord Lieutenant "may award such sum for compensation as he thinks just." Here we have no attempt to state any measure of compensation. Sect. 106 of the Grand Jury Act enables the Court to make a decree "for such sum of money as the Court shall think just and reasonable." Sect. 1, sub-s. 4, of the Act of 1919 provides that the "power to make a decree for such sum as he thinks just and reasonable shall include a power to make a decree for full compensation."

In this month's number of the King's Bench Division Reports there is a very elaborate judgment of M'Cardie J., delivered in respect of six cases (of which *Butterworth* v. *Butterworth* (1) is the first), dealing with damages in divorce proceedings. Its value in the present case is the clear division of the different heads of damage. The head-note states it thus: "The damages, if any, have always been compensatory only, and not exemplary or punitive. The grounds on which damages are given—1, the actual value of the wife lost; 2, compensation to the husband for the injury to his feelings, the blow to his honour, and hurt to his family life. The value of the wife has two aspects—1, pecuniary, and, 2, what may be called her consortium aspect. 1 depends on her fortune and her ability and assistance in the home or business; 2, on her character and ability as a wife and mother." This is fully developed in the judgment, with a full examination of the authorities. Its importance in the present case is that all these matters are "compensation for the wrongful act of depriving the plaintiff of his wife." Surely the same compensation ought to be payable in case of the wife being murdered, except that the injury to the husband's feelings would result from horror at the murder and sorrow for his loss.

The Irish Land Act, 1870, sect. 3, says: "The tenant shall be entitled to such compensation *for the loss which the Court shall find to be sustained by him by reason of his loss on quitting his holding* . . . as the Court may think just." The words in italics were repealed by the 6th section of the Act of 1881, so that the section was thenceforth

(1) [1920] P. 126.

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to be read as if they were omitted. It seems to me that the effect of this was plainly to enlarge the discretionary jurisdiction of the Judge, and that the compensation was no longer confined to the actual loss sustained. This, which was the former measure of compensation, is repealed. Under the general words, "such compensation as the Court may think just," it seems to me might well be included compensation for being turned out of an old family home as distinguished from pecuniary loss.

Lord Campbell's Act is intituled "an Act for compensating the families of persons killed by accidents." Sect. 1 provides that the person shall be liable to an action for damages; section 2, that the jury may give such damages as they may think proportioned to the injury resulting to the parties from the death. A limited construction has been placed on this Act in consequence of section 2, which made "the injury" the measure of damage, just as "the loss on quitting the holding" was made the measure in the Land Act of 1870. If the case of *Blake* v. *Midland Railway Co.* (1) be carefully read, it will be seen that it was on these express words of the Act (see pp. 109, 110) that the Court held that compensation could not be given for the mental suffering of the relatives. Lord Campbell was a member of the Court, and his observations during the argument rather show a leaning the other way. By the Scotch law, "where damages are sought for the loss of a father, husband, &c., through the improper negligence or misconduct of a party, they are not to be estimated merely by the pecuniary advantages which the family derived from his exertions, but a solatium will be given even where the death of the sufferer, instead of being a loss to his family, might be regarded as a benefit on account of his bankruptcy and dissipated habits." (Cited from Erskine, at pp. 99, 100, of 18 Q. B.) This was admitted to be the law of Scotland. This shows that there is nothing prima facie unreasonable in such a law. The Scotch law was called "Assythment," and the remedy is given "both as indemnification and solatium": Bell's Principles, quoted at p. 100 of 18 Q. B. The civil law was stated to be similar. It was pointed out that Scotland was excluded from the Act, and it was strongly argued that the intention was to assimilate the law of England to that of Scotland.

(1) 18 Q. B. 93.

At p. 101 there is a powerful argument by Sir F. Thesiger. In an action for enticing away the plaintiff's wife, Willes C.J. had said: "Here is a consequence laid that by means thereof the plaintiff lost the comfort and society of his wife, and the profit and advantage of her fortune." "If," said Sir F. Thesiger, "in the case of a wife the mere loss of her society be an injury for which damages may be assessed, she being alive, a wife may recover on the same principle for a wrong which takes from her the society of her husband, and it makes no difference that the same wrong caused his death," the Common Law objection on this ground being removed by the Act. Lord Campbell was a member of the Court, and his observations during the argument seemed in favour of the plaintiff. However, the Court reserved judgment. Subsequently, Coleridge J. delivered the judgment of the Court, and, referring to the argument, held, on the ground of the express words of sect. 2 of the Act, that it only extended to pecuniary loss. This was the leading case deciding the limitations of compensation under the Act.

There is an interesting commentary on the case in the judgment of Brett J. in *Rowley* v. *London and North-Western Railway Co.* (1). He says: "When Lord Campbell's Act was passed it was thought for a short time by some that damages might be given to the full extent of a perfect compensation. Such was in substance the direction of Parke J. in *Blake* v. *Midland Railway* (2). The jury were invited to give an annuity equal to the money loss, and further damages by way of consolation. The only point judicially decided was that the statute only gave a right in respect to pecuniary injury." "To the best of my belief, the invariable direction to juries since then until now has been that they must not attempt to give damages to the full amount of a perfect compensation for the pecuniary injury, but must take a reasonable view of the case, and give what they consider, under all the circumstances, a fair compensation."

If the tribunal under Lord Campbell's Act "must not attempt to give damages to the full amount of a perfect compensation for the pecuniary injury," it seems to me clear that the measure of damages under that Act cannot limit the compensation under an Act which amends a former Act by expressly authorizing full compensation.

(1) L. R. 8 Ex., at p. 230. (2) 18 Q. B. 93.

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O'CONNOR L.J.:—

Constable Patrick O'Connell was murdered while in the execution of his duty, and we are now called upon to decide certain questions as to the principles which determine the amount of compensation to be awarded under 6 & 7 Wm. 4, c. 116, s. 6, and 9 Geo. 5, c. 14, s. 1, and the class of persons to whom such compensation is to be paid.

Constable O'Connell was aged 36, and a bachelor. His father, aged 70, lives on a farm of 11 acres, with a brother and two sisters of the deceased. There is another brother, who is also a constable in the R.I.C. Constable O'Connell had thirteen years' service; his gross pay was £142 a year; if he had not been murdered, he would now have been in receipt of £234 a year; on retirement after thirty years' service he would have been entitled to a pension of two-thirds—namely, £156. He used to give his father £20 a year; he gave nothing to the remaining members of his family.

A point has been raised of such great and general importance that our full Court has met to consider it. But I think that when it is examined, it is a very simple point indeed. Counsel for the relatives contend, in effect, that in the case of a murder within the sections the murdered man must be treated as a machine capable of turning out so many sovereigns a year; that the machine has now been destroyed; and that, consequently, the tribunal, when ascertaining the compensation, has to capitalize the net yearly output, that is, the output after deducting the fuel and oil, the food, clothing, and upkeep necessary to keep the machine going. I am not sure whether, in the calculation, the appellants say that the age of the machine is to be reckoned, and the capitalized value ascertained accordingly. I rather think, from the actual figures in the first paragraph of the case stated, their contention before Kenny J. was that the capitalization process should have no regard to the age. This is plainly wrong, for it assumes perpetual life in the machine. But even if the age of the murdered man is to be taken into account, the argument is based on an entire misconception. What the statutes require to be done is to assess compensation; in other words, to give to the persons who have suffered loss by the murder full compensation for their loss. But to liken a human being for this purpose to a machine rolling out a net

surplus of so many sovereigns a year for the use and behoof of the persons who, at the date of his murder, are entitled to his personal estate by law, is a fallacy, for it leaves most, if not all, of the relevant considerations out of the count. A person who has an income, earned or unearned, may, subject to certain duties of supporting his family, do what he likes with it; he may spend it all, or he may not. If he spends it all, he has no surplus to give anybody. Again, if he saves some of it, he may dispose of his surplus as he wills; it frequently happens that he gives nothing in his lifetime to those who would be his next-of-kin if he died intestate, and it sometimes happens that these are the last people in the world whom he would wish, living or dead, to benefit. Further, those who would be entitled to share in his estate, if he died intestate to-day, may not be so entitled to-morrow, for the ordinary mutations of life, death or marriage, or the birth of children, may intervene to change the class at any moment. Yet, if the appellant's contention were to succeed, the fixing of compensation would be on a flat rate or basis, so to speak; ascertain the income, ascertain the amount necessary to keep body and soul together, capitalize the difference, and you find the amount of compensation. It is a delightfully simple process, no doubt; it has one disadvantage—it is all wrong. It might, and in many cases would, under the guise of compensation, put money into the pockets of people who would never have benefited a sixpence from the murdered man in his lifetime, or at his death from natural causes, whether he died young, or lived to the age of Methuselah; and in no case would it have any necessary relation to the actual loss suffered by those dependent, wholly or partly, upon the deceased. There is nothing in the sections to warrant the method of computation contended for, and I can only say that I am lost in admiration of the courage and ingenuity with which so far-fetched a scheme, under which £1,300 was awarded by the County Court Judge for a loss of £20 a year, was sought to be supported.

I now come to a point, also of great importance, and of real difficulty. I have carefully read the case stated by Kenny J., and I have come to the conclusion that the point was not raised before him at all. The sole point raised before Kenny J. was the amount of compensation; there was, obviously as I think, no question as to the class of persons entitled, and I rather suspect

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that both sides thought the deceased's father was the only person who could claim. The appellant's counsel, however, now says that Kenny J. ignored the claim of the brother and the sisters on the farm, who were possible recipients of the deceased's bounty. As I have said, I think that this claim was not put forward before Kenny J.; and, indeed, having regard to the facts, I am not surprised that it was not. The bounty of the deceased to his father—£20 a year—might have continued during the old man's life, even if the deceased had married. Kenny J. treated it as if it would have so continued, and I rather think I would have come to the same conclusion of fact myself. But during the old man's lifetime, or after his death, I would consider it most unlikely that Constable Patrick O'Connell would have considered that it lay upon him to provide any help for any other member of the family. He certainly, I should think, would not have done so had he married, which is the likely contingency. Even if he did not marry, how is his filial tribute to be taken as any index of his feelings and actions towards his other relatives? A man is under a moral and also a legal duty to support his parents, flowing from the closest of the ties of nature; he is under neither to his brothers or to his sisters. I know nothing of his feelings or his intentions towards them; it is not my experience that a man with an income such as the deceased had—an income on which he was able to live decently, but not much more—should deem himself of such affluence in regard to people circumstanced as his brothers and sisters in his case were that he would feel himself called upon to support them. Indeed, on the old man's death, it is possible that the inheritors of the farm, who would probably be the sisters and brothers there, would have as decent a means of livelihood and more actual capital than the deceased constable.

A conclusion of fact ought to be based upon a reasonable probability or probabilities. You cannot safely build on a foundation of mere "ifs," for that is a foundation of nothingness; and here it seems to me that to suppose that the sisters would have benefited on the father's death from the policeman's pocket rests on a basis of at least seven hypotheses, some of which, as I think, are reasonably probable, but others are entirely speculative:—1, if the constable should remain a bachelor; 2, if he should survive his father; 3, if he should remain in the police force; 4, if

he should continue in good health; 5, if the sisters should survive the father; 6, if the constable should remain on good terms with his sisters; and 7, if he should desire to translate his goodwill into terms of yearly cash. As Nos. 1, 6, and 7 are highly speculative, I am not disposed to award any compensation founded on what I consider a claim that is too tenuous for effective consideration.

Apart from the question of fact, the serious question of law is whether any person is eligible for compensation save those who would be entitled to share in the assets under the Statute of Distributions. Under sect. 106 of the 6 & 7 Wm. 4, c. 116, I think no person save those so entitled could claim compensation; but it is said that the Act of 1919 has enlarged the class, and has conferred a right upon any person who can show dependency. I have very great doubts as to the construction of the Act of 1919, which, however, I do not push to the point of dissent from the clear judgments on this point pronounced by the other members of the Court, more especially as I appreciate the convenience and avoidance of many hardships which follow from their conclusions.

A good deal of discussion has taken place as to the relevant considerations in fixing the amount of compensation. On that I content myself with saying this: My present view is that sentimental considerations—the grief and sorrow for the loss of a near relative or a benefactor, or the loss of society—are not proper elements for the tribunal to take into account. Subject to that, the tribunal should weigh all the relations of the deceased with those who claim to have lost by his death, and, by the light of common sense, endeavour to find its way to a sum which will ensure that those he has left behind shall be at no loss by his taking off.

Solicitors for the applicant: *Shannon & Co.*

Solicitor for Tipperary County Council (South Riding): *F. E. Tydd.*

Solicitor for Tipperary (No. 1) Rural District Council: *J. O'Dwyer.*

Solicitor for Tipperary Urban District Council; *W. Frewen.*

R. ST. J. C.

K. B. Div.
(Crown Side)
1920.

Oct. 26,
Nov. 1, 2, 26.

R. (MOORE) *v.* BENNETT (1).

Local Government—Chairman of District Council—Expiration of office—Right to vote until successor appointed—Local Government (Ireland) Act, 1898 (61 & 62 *Vict. c.* 37)—*Application of Enactments Order* (22*nd Dec.*, 1898), *Articles* 35, 36, *and* 37.

The outgoing chairman of a Rural District Council who has not been re-elected a member of the Council at the triennial election, although entitled to continue in office until his successor has accepted office and subscribed the required declaration, is not entitled at meetings of the new Council to give an original vote in addition to a casting vote.

QUO WARRANTO.

Application that an information in the nature of quo warranto be exhibited against William S. Bennett to show by what authority he claimed to be and to act as chairman of the Dungannon Rural District Council and a member of the Tyrone County Council.

The application was based on the grounds that the said William S. Bennett was not lawfully elected to the said office of chairman of the said District Council by a majority of lawful votes; that the votes of Mr. Watson and Mr. Young, which were recorded and counted for him, were invalid and void, and should not have been counted, as these persons had not been lawfully elected additional councillors by a majority of valid votes; that the original vote given for them at their election by the said William S. Bennett was bad; and that the right of the chairman to give a casting vote at the said election did not arise, and that the said William S. Bennett, not having been duly and lawfully elected chairman of the said District Council, had no title to be a member of the County Council under sect. 3 of the Local Government (Ireland) Act, 1898. In the alternative, the relator sought for a writ of mandamus directed to the members of the

(1) Before MOLONY C.J., and GIBSON and KENNY JJ.

Rural District Council, commanding them to proceed to the legal co-option of additional councillors, and to the election of a chairman of the said District Council according to law.

Numerous affidavits were filed on the hearing of the application, from which it appeared that the said William S. Bennett, at the commencement of the first meeting of the new Council, before any vote of the councillors had been taken, announced that he had been advised that he was entitled by law to give an original and a casting vote on questions arising at the meeting, and that he intended to exercise his legal rights in this respect.

The affidavits disclosed considerable controversy as to whether the said Mr. Bennett did, in fact, exercise his right to a first and original vote on the co-option of additional councillors.

The further facts and the nature of the arguments appear sufficiently from the judgments.

Healy K.C., Muldoon K.C. (with them *Martin Maguire*), for the relator.

Babington K.C., E. S. Murphy K.C. (with them *J. S. Baxter*), for Mr. W. S. Bennett and the Dungannon Rural District Council.

[Authorities quoted and discussed :—*R.* (*Scott*) v. *Londonderry Justices* (1); *Nell* v. *Longbottom* (2); *Bland* v. *Buchanan* (3); *R.* v. *Jackson, Ex parte Dick* (4); *R.* (*Moclair*) v. *Doris* (5); *R.* v. *Owens* (6); *R.* v. *Stanley* (7); *Faulkener* v. *Elger* (8); *Walsh* v. *Grimsby* (9): *In re Horbury Bridge Wagon Co., Ltd.* (10); *R.* v. *Cousins* (11); *R.* v. *Ward* (12); *Hounsell* v. *Suttill* (13). Reference was also made to Sir George Vanston's view, expressed at page 200 of Vanston's Local Government, vol. i (2nd ed.).]

(1) [1903] 2 I. R. 101.
(2) [1894] 1 Q. B. 767.
(3) [1901] 2 K. B. 75.
(4) [1913] 3 K. B. 436.
(5) 45 I. L. T. R. 267.
(6) 2 E. & E. 88.
(7) 11 A. & E. 882.
(8) 4 B. & C. 449.
(9) (Vanston, p. 178) 64 J.P. 819.
(10) 48 L. J. Ch. D. 341.
(11) 42 L. J. Q. B. 124.
(12) L. R. 8 Q. B. 210.
(13) L. R. 19 Q. B. D. 498.

K. B. Div. (Crown Side) 1920.

R. (MOORE) v. BENNETT.

MOLONY C.J.:—

Under Article 37 of the Application of Enactments Order, dated 22nd December, 1898, the term of office of the chairman of a Rural District Council was fixed at one year, with, however, a provision that he should continue in office until his successor has accepted office and made and subscribed the required declaration. Article 35 (3) provides for the holding of an annual meeting by the Rural District Council, and Article 35 (5) provides that at such annual meeting—(*a*) if it is the first meeting after a triennial election, the first business transacted thereat shall be a consideration of the question of choosing, and, if it is so determined, the choice of additional councillors; and (*b*) the second business shall be the choice of a chairman and vice-chairman; and further provides that in case of equality of votes the chairman of the meeting, although not entitled to vote in the first instance, shall have the casting vote.

It appears that early in the month of June, 1920, a new council, consisting of seventeen members, was elected in Dungannon, and of these nine members represented one party and eight members represented another party. Mr. W. S. Bennett was chairman of the old council, to which he had not been re-elected, but under the provisions of Article 37 he presided at the annual meeting. He was of the same political faith as the eight, and when it was proposed to co-opt additional councillors he claimed the right to exercise an original vote in favour of the persons proposed, thereby procuring an equality of votes, which would enable him to give his casting vote and declare the persons elected. His right to exercise an original vote was challenged at the time; but he, acting under legal advice, persisted in his claim, and the question to be determined in the present case is whether, in the circumstances, Mr. Bennett had and was entitled to exercise both an original and a casting vote. It is admitted that Mr. Bennett was entitled to preside at the meeting by virtue of Article 37, and, as chairman, might give a casting vote; but it is contended that, as he had not been re-elected a member of the council, he was not entitled to exercise an original vote.

The effect of Article 37 is undoubtedly to prolong the term of office of the chairman until his successor has accepted office, and this carries with it all the rights which he exercised by reason or on account of being such chairman, including that of Justice of the Peace: *The King* (*Scott*) v. *The Justices of Londonderry* (1). His right, however, to exercise an original vote is not a right incident to the office of chairman, but results from being a member of the council, and when he has ceased to be a member of the council, it is difficult to see upon what basis he can be regarded as being still entitled to exercise an original vote. Undoubtedly Article 35 (4) (*c*) contemplates the case of a chairman not being entitled to vote in the first instance; but it is quite clear that he would always be entitled to vote in the first instance if he was at the time a member of the council.

Article 37 is copied from sect. 61, sub-s. 4, of the Municipal Corporations Act, 1882, and it has been held in *Nell* v. *Longbottom* (2) that the provision in sect. 61, sub-s. 4, does not prevent a chairman from voting in the first instance unless he is otherwise disqualified. That was the case of the election of mayor, and the retiring mayor was still a member of the council, and he was held entitled to exercise both his original vote as such member of the council, and, in addition, his casting vote as retiring mayor. Similarly in the present case, if Mr. Bennett had been re-elected a member of the council, he would undoubtedly have been entitled to exercise both votes.

It is, however, contended on the part of Mr. Bennett that he was entitled to exercise an original vote although he had not been re-elected a member of the council, and for this proposition reliance has been placed on the cases of *Bland* v. *Buchanan* (3) and *The King* v. *Jackson*; *Ex parte Dick* (4).

Bland v. *Buchanan* (3), however, cannot be relied upon as an authority, even assuming that no valid distinction can be drawn between the statutory effect of sects. 10 and 15 of the Municipal Corporations Act, 1882, and Article 37 of our order, because in that case the question of the right of the outgoing mayor—who had not been re-elected a member of the council—to give an

(1) [1903] 2 I. R. 101.
(2) [1894] 1 Q. B. 767.
(3) [1901] 2 K. B. 75.
(4) [1913] 3 K. B. 436.

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original vote was not contested, it having been admitted by counsel for the petitioner that if the validity of this vote depended upon the statutory provisions of the Act of 1882 alone, it was good. Sect. 38 of the Act provides in express terms that the mayor shall during his office continue to be a member of the council, notwithstanding anything in the Act as to councillors going out of office at the end of three years. There is no corresponding section in Ireland.

In *The King* v. *Jackson* (1) the question arose in reference to the chairman of a parish council. Parish councils were established in England by the Local Government Act of 1894 (56 & 57 Vict. c. 73), sect. 3, sub-s. 8, of which provides that at the annual meeting of a parish council the council shall proceed to select from their own body, or from some person or persons qualified to be councillors of the parish, a chairman, who shall, unless he resigns, or ceases to be qualified, or becomes disqualified, continue in office until his successor is elected. The rules in regard to election are contained in the First Schedule, Part II, of the Act; and rule 3 provides that the first business of the annual meeting shall be to elect a chairman, and rule 10 provides that in case of an equality of votes the chairman of the meeting shall have a second or casting vote.

There is a great distinction between our Article 35 (4) (*c*), which recognizes that the chairman may not be entitled to vote in the first instance, and sect. 10 of the First Schedule to the Act of 1894, which implies that the chairman has a vote in the first instance by specially dealing with the circumstances in which he shall exercise a second or casting vote; consequently I think that *Jackson's Case* (1), so far from being an authority in favour of Mr. Bennett, is rather against him.

I am, therefore, of opinion that Mr. Bennett was not entitled to exercise an original vote at the meeting, not having been re-elected a member of the council; but by virtue of his position as chairman of the old council he would have had a casting vote if the occasion for it arose.

It is next contended that Mr. Bennett did not in fact exercise a casting vote, it being unnecessary to do so, as the nine members

(1) [1913] 3 K. B. 436.

who were opposed to Mr. Bennett refused to vote, and formed themselves into a second meeting, under another chairman. There is a great conflict of testimony on this point; but the one fact that emerges clear from the mass of affidavits is that Mr. Bennett asserted his right of giving two votes, and declared his intention to give them, and that in the face of his proposed action opposition on the part of the others would necessarily be ineffective.

In my opinion, in the circumstances, it is impossible to say that there was a valid election, and consequently an information in the nature of a quo warranto must issue.

GIBSON J.:—

I agree with the judgment of my Lord. The main question before us is whether the official chairman of a defunct council is entitled at the first meeting of the new council, of which he is not a member, to give an original vote on the choice of three additional councillors so as to produce equality of votes, and then to obtain a majority by his casting vote, with the result that the character of the council is altered in defiance of the wishes of the majority of the newly elected councillors. Our conclusion depends on the effect of our Local Government statute and Application of Enactments Order, which adopts many of the provisions of the English statutes of 1882 and 1894, but with substantial omissions and additions. Our legislation must be construed as a composite whole in a new framework and setting. The Local Government Act, 1888, not referred to in argument, in sect. 75 applies Parts 2 and 3 of the Act of 1882. Before any of these enactments, examples of analogous legislation occur, somewhat varying in type. Thus in 5 & 6 Wm. 4, c. 76, sects. 26 and 49, like sects. 15 and 38 of the Act of 1882, not only is the outgoing head continued in office, but he is kept on as a member of the corporate body. See also the Commissioners' Clauses Act, 10 & 11 Vict. c. 16, sects. 33 and 34. The Act 3 & 4 Vict. c. 108, sects. 83 and 84, continues the office only. Sometimes the mayor or chairman possesses a second or casting vote: the Act of 1847, c. 16, sect. 38, 3 & 4 Vict. c. 108, sect. 83. In other statutes he is given a casting vote simpliciter: 7 Wm. 4 and 1 Vict. c. 78, sect. 14. The addition of continuance

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of membership to continuance of office would seem to indicate that the continued office did not of itself carry with it plenary rights of membership, and the expression "second or casting" would assume a right to record a first vote. I shall first discuss our legislation, and then briefly examine the statutes of 1882 and 1894 and the decisions thereon.

The chief provisions in our code besides the statute of 1898 itself are Articles 35, 36, and 37. Article 35, sect. 5, deals with the first meeting of the new council and annual meetings. At the first meeting the first business is to decide whether there shall be three additional councillors, and who shall be chosen under sect. 113, sub-s. 3, of the Act; the second business is the choice of the official chairman or vice-chairman. At other annual meetings the first business is the choice of the chairman or vice-chairman. Then comes clause (*c*), which enables the chairman of the meeting, though not entitled to vote in the first instance, to give a casting vote. It is to be noted that at such first meeting, when the permanent composition of the council by the introduction of non-elected members might be vitally affected, the old chairman and vice-chairman might be absent, in which case a councillor might, under Article 36, sect. 9, be chosen as acting chairman, and such chairman, being a councillor, would necessarily have two votes at an annual meting; for Article 35, sect. 5 (*c*), gives a casting vote to a chairman whether he is or is not entitled to vote in the first instance. Article 36, sect. 12, authorizing the chairman of the meeting to give a second or casting vote, is confined, as counsel agree, to quarterly meetings, where the chairman must be a member of the council, and does not apply to the chairman of the annual meeting, who may or may not have an original vote. Article 36, sects. 9, 10, and 11, are, however, general, and apply to annual as well as to quarterly meetings. If the chairman of the previous council, who had ceased to be a councillor, is continued in office only as chairman—without being a member of the council and entitled to vote as member—full effect is given to the contingency contemplated by Article 35, sect. 5 (*c*). The possibility of a chairman not having an original vote might arise at a first meeting. It could not at subsequent annual meetings. Mr. Bennett's counsel failed to supply any other possible case where,

on their construction, inability to give a primary vote existed. The suggestion that clause (*c*) was only ex abundanti cautela, where a subject-matter for its operation in case of a first meeting exists, seems untenable, especially where it is closely associated with clause (*a*). Mr. Babington, without much confidence, argued that it might refer to disqualification or loss of qualification. But what is contemplated is legal, not unlawful action. If an original vote by a disqualified person is forbidden and punishable, a casting vote is in no better position, whether given under Article 35 or 36, which latter assumes a legitimate first vote, followed by a second lawful vote. The business at annual as well as at quarterly meetings may relate to contracts and other matters. Clause (*c*) does not disable a chairman from giving a first vote if he is a councillor, but it contemplates a contingency where, not having a first vote, he can lawfully give a casting vote. The only case where apparently such contingency would occur would be that of an outgoing chairman at the first meeting not elected to the new council, in order to prevent a deadlock. Article 37 continues the office, with its peculiar incidents, such as Justiceship of the Peace; but it does not purport to continue constructive membership, in this respect differing from the Act of 1882, sect. 38. The chairman is a kind of supernumerary, as described in *Rex* v. *Owens* (1). The language of Lord Campbell in that case, "he [the mayor] remains a member of the council, but not a councillor," is remarkable, having regard to sects. 26 and 49 of the Act of 1835. This case was not referred to in any of the recent English decisions.

Next, as to the English statutes which, as interpreted by Judges, are said to guide or govern the construction of our enactments. The Act of 1882, which makes the members retire in thirds, is the most material, Article 37 being taken from sect. 15, sub-s. 3, and Article 35, sect. 5 (*c*), being copied from sect. 61. There is nothing in the Act corresponding with the right of co-opting non-elected persons at a first meeting; the context in which clause (*c*) is placed is different from sect. 61; and a noteworthy distinction is that sect. 38, which might have removed the difficulty, is deliberately left out. Sect. 61 was, probably, intended to cover

(1) 2 E. & E. at p. 88.

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cases where an original vote was expressly forbidden, as it was in some statutes, as in *Reg.* v. *Stanley* (1). See also 51 & 52 Vict., c. 41, sect. 75, sub-s. 10. There may be other instances of the same kind, and sect. 61 was framed to meet such possible cases. In clause (*c*) the disability of an outgoing chairman supplies a subject-matter; it is unnecessary to deprive the clause of all effective operation by referring it to a precaution against an unknown and non-existing incapacity.

On this statute there are two decisions: *Nell* v. *Longbottom* (2), containing dicta as to sect. 61, and *Bland* v. *Buchanan* (3). The latter case decided that Mr. Treasure, who had ceased to be a member of the council, was entitled as mayor to an original as well as to a casting vote. Counsel admitted in argument that under the statute Treasure was entitled to a first vote. A decision when the point was admitted is of small value. Sect. 38 was not specifically relied on, but I must suppose that it was not overlooked by counsel or by the Court. This case, more relevant than any cited in argument, does not govern the construction of our legislation. If it was intended to rule that sect. 15, sub-s. 3 (the same as our Article 37), of itself, and without sect. 38, conferred a right to give an original vote, I should hesitate to adopt that conclusion. But taking the frame and setting of our code, I cannot treat the case in any view as controlling our interpretation.

The Act of 1894, c. 73, sect. 3, sub-s. 8, continues the chairman of the council in office, unless he resigns or ceases to be qualified or becomes disqualified. Schedule 1, part 2, contains clauses similar to our Article 35, sect. 5 (*b*), and to article 36, as to voting and the chairman's second or casting vote. There is no continuance of the chairman's former membership, specifically provided for by sect. 38 of the Act of 1882, and the contingency of the chairman not having an original vote is omitted, the right to give a second or casting vote assuming capacity to give a first vote. Further, the chairman might be appointed from persons outside the council, which was for only a year, not three years. On this statute it was held in *Jackson's Case* (4) that the outgoing chairman could create a majority by voting twice.

(1) 11 A. & E. 882.
(2) [1894] 1 Q. B. 767.
(3) [1901] 2 K. B. 75.
(4) [1913] 3 K. B. 436.

The above legislation and decisions do not apply to or control our local government system, which is marked by many fundamental differences: 1, the first duty at the primary meeting of the three-year council is the choice of three co-opted councillors, who may permanently alter the voting power of the elected members; 2, there is a striking contrast between Article 35, sect. 5 (*c*), and Article 36, sect. 12; 3, clause (*c*) fits the case of an outgoing chairman who is not one of the new members, and does not appear to apply to any other known inability of such chairman to give a first vote; 4, the frame and collocation of the articles support the limited construction; 5, the policy of constituting the council with an unequal number of members, to secure normally a majority vote, would be defeated, if at the first and most important meeting the non-member outgoing chairman could produce equality of votes, and then give a casting vote obtained by his own act; 6, the omission of any provision like sect. 38 of the Act of 1882 indicates that the office of chairman is continued only for the purpose of chairmanship functions proper, and does not attach to the office the rights of a true member. It cannot be supposed that sect. 38 is otiose and inoperative; it was designedly omitted.

I am not called on to express any adverse criticism on the decisions of 1901 and 1913, which seem plainly distinguishable, as they were addressed to dissimilar statutes. Were it otherwise, I should be prepared to act on my own construction of our code as a new homogeneous whole. In Imperial statutes, Courts from judicial comity follow decisions pronounced in other parts of the United Kingdom, but in local statutes, though adjudications of English and Scotch Judges are entitled to respectful consideration, they do not bind or compel other Courts to place a construction on the enactment which they believe to be erroneous. In *Bland's Case* (1), which touches the present situation most closely, counsel admitted that the statute of 1882 gave a first vote. Section 38 had that effect, and the attention of the Court was not given to the points I have referred to, which did not require decision. The statute of 1894, before the Court in *Jackson's Case* (2), was quite unlike our articles.

(1) [1901] 2 K. B. 75.

(2) [1913] 3 K. B. 436.

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Our duty in construing our code, just as in case of a will or a deed, is to elicit its effect from the whole as its stands, and then to inquire whether other statutes or decisions displace our conclusion. Our legislation is a mosaic in part pieced out from other statutes, which, in some respects similar, are by no means identical, and it is illegitimate to force into our local government fabric meanings applied to clauses in statutes in a different context.

I have come to the clear conclusion that the outgoing chairman, although a supernumerary, able to act as Justice and give a casting vote, was not entitled at the first meeting to give a first vote and then a second, thus putting the majority of elected members in a permanent minority during the council's existence. On Mr. Bennett's contention, if, owing to accidental absence of one of the members, the members were equal—eight and eight—he could, though not one of the elected members, have turned the scale in favour of his own side by giving an original vote without any reference to casting vote at all. That a chairman of a dead council, replaced by a council newly elected on which he has failed to be returned, should possess two votes, and thereby frustrate the decision of the electorate, is so unreasonable that the clearest language should be required to produce that startling and inconvenient result. The council being of uneven members normally if all attended, there would be a majority on one side or the other. The plain purpose of thus securing a majority of votes would be defeated if a non-elected chairman, not a member of the new council, could give two votes.

The chairman not having an original vote, if he voted, the election was admittedly invalid. I think it would have been equally invalid if the majority party had then declined to vote, as the result would have been a foregone conclusion. Mr. Bennett is not to blame for claiming a first vote, as it was mistakenly thought that *Jackson's Case* (1) established that right. He came to the meeting with a fixed intention to exercise that right, and this, publicly announced, or at least known, predetermined the result of the election, no matter whether the true majority voted or not. His claim was at once challenged, and the majority party,

(1) [1913] 3 K. B. 436.

having chosen a chairman of their own, proceeded to election. It was urged that the voting went on without the chairman finding it was necessary to vote, and that the majority lost their chance by omitting to record their votes. The whole proceeding was conducted in confusion, haste, and passion. There was irregularity, much of the voting being by show of hands, and the record was not filled in at the time, and was at first inaccurate. The trouble was caused by Mr. Bennett's illegal claim; he was well aware that there was a hostile majority, who must win if he abstained. It is alleged that he was seen to hold up his hand as if voting, and perhaps in the noisy turmoil he made such gesture, perhaps unconsciously, or at least this was the honest impression of the angry majority.

The incidents described in the affidavits probably occurred rapidly; the order of the disorderly events is not easy to place consecutively. As to the accuracy of the conflicting statements, I prefer not to express a positive opinion. But, assuming that Mr. Bennett did not actually vote by hand or word, the result was obtained by a snap and rushed vote on the basis of Mr. Bennett's unlawful claim; it was completely opposed to the views of the majority present, as all well knew. The recorded decision cannot be accepted as truly representing the decision of the meeting. The mistaken and illegal action of the chairman, resolved to secure victory by voting twice, necessarily caused confusion, irregularity, and heat. The feeling of the true majority is evidenced by their displacing Mr. Bennett as chairman; without another chairman they must be defeated. *R.* (*Moclair*) v. *Doris* (1), in principle, supports my conclusion. See also the remarks of Keogh J. in *Hall* v. *Walker* (2); *Faulkener* v. *Elger* (3), cited by Mr. Muldoon, also assists. There a vote was wrongly rejected, but it was not proved on which side it would have been cast. At p. 455, Bayley J. adverts to electoral rights being prejudiced by an unlawful decision beforehand. Between excluding a lawful vote, and the chairman, who is supposed to act in a judicial spirit, insisting on an unlawful vote, there is not much difference so far as the actual result.

(1) 45 I. L. T. R. 267. (2) I. R. 9 C. L. 69. (3) 4 B. & C. 449.

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Though much of the argument was addressed to the chairman having in fact voted, the wider question opened by Mr. Healy, that there was no real majority of lawful votes, and that the recorded result cannot thereupon be allowed to stand is open on the conditional order. Were it otherwise, I should allow the order to be amended, the matter having been fully debated at the bar. The game was fatally disordered when the chairman announced, or let it be known, that he held the winning cards. The game was played in unfair conditions, and the nominal result was not a true or real victory. Mr. Bennett was not morally to blame for relying on *Jackson's Case* (1), as he did, but his claim was illegal. Whether he knew or did not know the law, in the result the rights of the opposition majority were prejudiced and defeated.

KENNY J.:—

The questions that have been discussed on this application for a quo warranto were—1, whether Mr. Bennett, in addition to the casting vote to which he was entitled under Article 35 of the Application of Enactments Order, 1898, was entitled to a first or original vote; and, 2, whether as a matter of fact he had given a first vote. The minutes purported to show that he had not given an original vote, but the matter was strongly controverted, and there was a body of evidence on behalf of the relator to the effect that he had done so, and that the minutes were incorrect in not recording the fact. It was also contended on behalf of the relator that, having regard to the attitude taken up by Mr. Bennett at the meeting, and the statements made by him as to his intentions in connexion with the voting, the result was affected, and that an election conducted in such circumstances ought not to be allowed to stand. The main question we have to consider, however, is whether Mr. Bennett was entitled to give an original vote. That question necessarily had to be argued on the assumption that as a matter of fact he had purported to give it. His right to do so is based on Article 37 of the Schedule of Enactments Order, taken in connexion with Articles Nos. 35 and 36. Article No. 37 provides that an outgoing chairman of a council "shall

(1) [1913] 3 R. B. 486.

continue in office until his successor has accepted office." That enactment seems to me to mean no more than this: that whatever the powers and privileges of a chairman, qua chairman, were during his year of office, he is to have the same powers and privileges during the existence of the interregnum between the completion of his year of office and the acceptance of office by the gentleman selected as the new chairman. He himself might be the newly selected chairman. During his year of office that had come to an end he had a vote as councillor, but when he failed in his election to councillorship his right to vote in that capacity determined. Mr. Bennett on the day of meeting was neither an elected nor a nominated councillor; and I find nothing in the Local Government Act or the Schedule of Enactments in the remotest degree providing for the retention by him of any right conferred by the position of councillor. It is merely his rights as chairman of the body that are continued. It seems to me it would be contrary to the spirit and object of the Act if we were to hold that the words "continue in office" in the context where they are found could possibly be extended for the purpose of clothing a chairman with original rights unconnected with his office of chairman. Had he been returned as a councillor, he would have had those rights in conjunction with those of chairman; but to hold that he had them under the words of the 37th Article would in the present case in effect amount to conferring on him the power of determining the constitution of the council for the coming year, and of possibly defeating the views of the electors.

The question as to the actual giving of an original vote by Mr. Bennett and the proceedings at the meeting may be the subject of inquiry after the return to the writ. It is enough to say that the matter is in controversy.

I concur in thinking that the writ ought to go.

Solicitors for the relator: *John Skeffington* and *Hoy & Son.*

Solicitors for W. S. Bennett and the Dungannon Rura District Council: *Simmons & Meglaughlin.*

H. J. M'C.

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M'DONNELL *v.* M'DONNELL (1).

Foreign judgment—Enforcement—Action—Defence—Judgment not final and conclusive.

By an order of the District Court of the Third Judicial District of the State of Montana, made in an action in which the plaintiff sued her husband for support and maintenance, he was ordered "to pay into the office of the Clerk of the Court the sum of forty dollars per month for the support and maintenance of the plaintiff, such payments to be made until the further order of the Court."

In an action by the plaintiff against the executor of her husband, who had since died, for the sum of £480 arrears due under said order: *Held*, by the King's Bench Division (Molony C.J. and Gordon J., Pim J. dissentiente), reversing the judgment of Samuels J., that the order was not such a final and conclusive judgment as to be enforceable by the Irish Courts.

Per Gordon J.: Even though the plaintiff had a final judgment for each monthly instalment of maintenance, the order of the Court of Montana, directing payment thereof into Court until further order, was not a final judgment that the deceased was indebted to the plaintiff in £480, the total of such instalments.

TRIAL OF ACTION.

This action was tried before Mr. Justice Samuels, sitting without a jury, at the Michaelmas Sittings, 1919. It was brought by the plaintiff, the widow of Alexander M'Donnell, deceased, against the defendant as executor of her deceased husband. The plaintiff claimed the sum of £480, the equivalent in English money of 2,400 dollars, being the amount due to the plaintiff on foot of a judgment dated the 3rd day of April, 1911, of the District Court of the Third Judicial District of the State of Montana, in the United States of America, and submitted that the said Court was duly constituted and held in accordance with the laws of the United States of America. The plaintiff, by her claim, also sought to recover the sum of £66 19*s.* 10*d.*, for money payable by the defendant as such executor to the plaintiff

(1) In the King's Bench Division, before MOLONY C.J., and PIM and GORDON JJ.

for money paid by the plaintiff in and about the funeral of the said deceased. The defendant traversed the allegations in the statement of claim, denied the jurisdiction of the Court of Montana, and pleaded that he did not request the plaintiff to pay deceased's funeral expenses; that said expenses were extravagant, and that he had fully administered the estate and effects of deceased.

The following statement of the facts is taken from the judgment of MOLONY C.J.:—

This action was brought by Mary Anne M'Donnell against Patrick Joseph M'Donnell, as executor of Alexander M'Donnell, deceased, to recover the sum of £480, claimed to be the amount due on foot of a judgment of the District Court of Montana, in the United States of America, and £66 19*s.* 10*d.* for money paid in respect of the funeral of the said Alexander M'Donnell, deceased.

The defendant, in his defence, denied the existence and validity of the alleged judgment, and also relied upon the plea of plene administravit. He traversed the causes of action as respects the funeral expenses, but it was admitted before us that the expenses were reasonable and proper, and no issue was raised in reference to them.

It appears from the evidence and documents proved at the trial that the plaintiff, Mary Anne M'Donnell, was married to Alexander M'Donnell, deceased, and had one child, a daughter named Edna. The parties went to America, and in 1911 were both resident in Montana. In that year differences having arisen between them, the plaintiff brought a suit in the District Court of the Third Judicial District of the State of Montana claiming maintenance as against the deceased. The proceeding was apparently one which, according to the law of the State, was to be adopted where the applicant had a conscientious objection to divorce, and the complaint contains a recital to that effect. On the 3rd April, 1911, the Court made an order by which the said Alexander M'Donnell was ordered and adjudged to pay into the office of the Court the sum of forty dollars per month for the support and maintenance of the plaintiff until the further order of the Court.

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Alexander M'Donnell shortly afterwards returned to Ireland, and afterwards went back to America and died there. He never lodged any sum in Court in pursuance of the decree, nor did he pay any sum to the plaintiff, and at the time of his death he ought to have lodged 2,400 dollars, or, in British currency, £480. He made his will on the 2nd day of June, 1914, leaving his property to the defendant, and on the 9th day of January, 1918, the defendant obtained probate of the said will, the assets being sworn for such purpose at £475.

No evidence was given at the trial as to the law of Montana.

Mr. Justice Samuels gave judgment for the amounts claimed against the defendant as executor of Alexander M'Donnell, deceased.

The form of the order of the District Court of the Third Judicial District of the State of Montana was as follows :—

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF DEER LODGE.

Mary A. M'Donnell, plaintiff, v. *Alexander M'Donnell*, defendant.

ORDER.

The application of the plaintiff in the above entitled action, coming on regularly, to be heard in open Court, at the regular April, 1911, Term of said Court on this 3rd day of April, 1911, for support and maintenance and counsel fees in her behalf; and it appearing to the Court that on the 22nd day of March, 1911, an Order was duly issued out of said Court in the above entitled action, directing and requiring the above-named defendant to show cause, if any he has, why he should not be required to pay a monthly sum for the support and maintenance of the above-named plaintiff and counsel fees in her behalf, and which Order was duly made and given, and which Order was by said Court made returnable at the hour of 9.30 a.m. of the 3rd day of April, 1911, and it appearing to the Court that said Order was duly served on the defendant, together with a copy of the complaint and a copy of the affidavit of the above-named plaintiff, and the Court being unable to hear said Order at the time designated therein, the hearing of the same was by consent of the parties by the Court continued until the hour of 1.30 p.m. of the said 3rd day of April, 1911, at which time the above-named plaintiff appeared in person and with her counsel, T. P. Stewart, and J. H. Duffy and John H. Tolan, Esq., appearing in behalf of the defendant, the Court by consent of counsel proceeded with the hearing of the Order aforesaid, and the above-named plaintiff, Tom O'Brien, Mr. Hayes, and Stocton Veazy were each sworn and testified in behalf of the plaintiff in the above action and there being no

testimony offered by or in behalf of the above-named defendant, and the Court having duly considered the testimony in behalf of the plaintiff aforesaid, does hereby order, and it is hereby ordered, adjudged, and decreed that the above-named defendant pay into the office of the clerk of the above entitled Court on the 8th day of April, 1911, the sum of forty (40) dollars, for the support and maintenance of the above-named plaintiff, and that he further pay on the 8th day of each and every month after the said 8th day of April, 1911, the sum of forty (40) dollars per month for the support and maintenance of the above-named plaintiff, and that such payments be made until the further order of the Court; and it is further ordered, adjudged, and decreed, and this Court does hereby order, adjudge, and decree that the above-named defendant pay to J. H. Duffy and T. P. Stewart as counsel fees in behalf of the above-named plaintiff the sum of one hundred (100) dollars, and which said sum (of 100$) shall be paid as follows: fifty dollars on the 12th day of April, 1911, and the remaining fifty dollars on the 9th day of May, 1911.

And it is further ordered, adjudged, and decreed that the restraining Order issued by the above entitled Court on the 22nd day of March, 1911, shall continue to remain in full force and effect until the further order of this Court.

Done in open Court this 3rd day of April, 1911.

JEREMIAH J. LYNCH,
Presiding Judge of the above entitled Court.

Serjeant Sullivan K.C. and *Cecil Lavery*, for the plaintiff; *Best K.C.* and *J. C. Davidson*, for the defendant.

[Authorities cited and discussed:—*Keys* v. *Keys* (1); *Patrick* v. *Shedden* (2); *Nunn* v. *Nunn* (3); *Nouvion* v. *Freeman* (4); *Bailey* v. *Bailey* (5).]

Cur. adv. vult.

GORDON J.:—

The plaintiff in this action resides in the United States of America, and is the widow of Alexander M'Donnell, deceased, who died in the United States on the 8th of September, 1917. The defendant is the executor of Alexander M'Donnell, and obtained probate of his will in this country on 9th January, 1918. The action is brought to recover from the defendant as such executor the sum of £546 19*s.* 10*d.*, of which £480 is claimed on

(1) [1919] 2 I. R. 160.
(2) 2 E. & B. 14.
(3) 6 L. R. Ir. 115; 8 L. R. Ir. 298.
(4) 15 A. C. 1; 37 Ch. Div. 255.
(5) 13 Q. B. D. 855.

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foot of a judgment of the District Court of the Third Judicial District of the State of Montana, in the U.S.A., dated 3rd April, 1911, whereby she alleges she recovered against the deceased the sum of 40 dollars a month, which the Court adjudged and ordered him to pay to the plaintiff, and this £480 is made up of the monthly sum of 40 dollars from 8th September, 1911, to 8th September, 1917. The balance of £66 19*s.* 10*d.* is for money paid by the defendant for and connected with the funeral of deceased. The defendant denies that the plaintiff recovered judgment against the deceased as alleged, or at all, or that there is any such judgment, and says that the Court was not duly constituted, and had not jurisdiction between the parties. He also says that he did not request the plaintiff to pay the funeral expenses, and that the payments made were extravagant; and to the entire claim he pleads plene administravit. The case was tried by a Judge without a jury, and resulted in judgment being entered for the plaintiff for the full amount claimed and costs. The plaintiff was examined, and said she was married to deceased in 1898. There was one child of the marriage. When she obtained the judgment she and her husband were living in Montana; he was afterwards confined in a lunatic asylum in America, where he died; nothing had been paid on foot of the judgment, and there was £480 now due in respect of it; and she had paid £66 19*s.* 10*d.* for deceased's funeral expenses. A certified copy of the judgment of the District Court of Montana was entered, and also a certified copy of the probate of deceased's will, from which it appeared his assets were sworn at £475. Mr. Best, for defendant, objected—1, that the judgment was not duly proved, the certificate was sealed but not the judgment; 2, that the money was to be paid into Court, not to the plaintiff, and there was no implied contract to pay the plaintiff. These objections were overruled.

Defendant was examined, and said he had no assets of deceased. A land certificate was produced, in which defendant's mother was named as a limited owner of a farm under the will of her husband, dated 3rd March, 1890. By this will the farm was given to her "in trust during her day for deceased, to be given to him at her demise, she to make provision for her two

daughters off the place at their marriage as the means of the place may admit." It was deceased's interest in the farm under this will that was valued at £475.

The two main grounds upon which the judgment is sought to be set aside are—1, that there were no assets of deceased in the hands of defendant to be administered; 2, that the plaintiff was not entitled to maintain an action on the judgment sued on. It was admitted that if defendant had assets of deceased, he would be liable for the funeral expenses, and that the amount claimed could not be disputed.

Now, the first question is, had defendant assets of deceased in his hands to be administered? If he had not, that would be an answer to the action. He has himself sworn the value of the assets to be £475, and it is admitted that this is the valuation put upon deceased's interest in the farm, whether he was entitled to it in remainder or reversion, or as beneficial owner; but the contention is, as I understand it, that his interest was in remainder or reversion, and that such an interest in a chattel real is not assets in the hands of an executor. I think the law is too well settled as to this to require any discussion. A remainder or reversion is a saleable interest; and in Wentworth on the Office of Executor, 189, Comyn's Digest C, and Williams on Executors, 1280, such an interest is stated to be assets in the hands of an executor.

The only question, therefore, is as to the claim which is based on the alleged foreign judgment. I am aware that my brother Pim takes a different view on this question, and I can only state my opinion as the case presents itself to me.

It is well settled that in order to maintain an action on a foreign judgment, the judgment must be one which results from an adjudication of a Court of competent jurisdiction, such judgment being final and conclusive; and Lord Herschell in *Nouvion* v. *Freeman* (1), at page 9, says:—"In order to establish that such a judgment has been pronounced, it must be shown that in the Court by which it has been pronounced it conclusively, finally, and for ever established the existence of the debt of which it is sought to be made conclusive evidence in this country, so as to make it a res judicata between the parties." The right to sue on such a

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judgment must be vested in the person bringing the action. The judgment in this case is in a proceeding by a wife against her husband for support and maintenance. No evidence has been given as to the law of the foreign state in reference to such proceedings, or as to the effect of an order or judgment such as we have here. It was not a proceeding for divorce or judicial separation, such as we have in this country, and in which an order might be made for alimony; such an order, if made, could not be enforced by an action founded on non-compliance with its terms. See *Keys* v. *Keys* (1), and the cases there cited. But in the absence of any evidence as to the foreign law, one would think that this order, judgment, or decree (whatever it may be called) must be analogous to our orders for alimony. It could hardly be supposed that the wife was to continue to get the monthly payment no matter how she might have misconducted herself. Part of plaintiff's case in her complaint was that she was unable to earn a living for herself and her child. Might not questions in reference to the child arise which would cause the Court to exercise control over the payment of these monthly sums? These or other considerations must have been present to the Court when it made the order in the form in which it was made. The order is not that the forty dollars a month should be paid to the plaintiff, but that the defendant should pay it into the office of the Clerk of the Court for the support and maintenance of the plaintiff, and that such payments be made until the further order of the Court.

The plaintiff adds together six years of these monthly payments, making together £480, and says she has a judgment of a foreign competent Court for this amount. I cannot see that any such judgment exists. She says in effect, as I think she must contend in order to succeed, that this order, judgment, or decree is a final judgment, conclusively determining that the deceased was indebted to her in £480. This, it appears to me, is not supported by an order, adjudication, or decree that deceased should pay forty dollars a month into the office of the Clerk of the Court until further order. For these reasons I am of opinion that the part of the plaintiff's claim for £480 based on the foreign order or judgment fails; but that she is entitled to judgment for the balance

(1) [1919] 2 I. R. 160.

of the claim, £66 19*s.* 10*d.*, paid by her for funeral expenses, together with the costs of the action, but that each party should abide their own costs of this motion.

PIM J.:—

A judgment in personam made by any foreign Court may be sued on in these realms as a new cause of action. In many countries on the Continent of Europe, foreign judgments are not treated as new causes of action, but are admitted to execution by a special proceeding for that purpose. British Courts, however, have always held that they were entitled to inquire into the jurisdiction of the Court that made the judgment, and as to whether the judgment had been obtained by fraud, and they have, therefore, insisted upon an action being brought on the foreign judgment. However, every order of a foreign Court cannot be sued on. The judgment must, in the words of Lord Herschell in *Nouvion* v. *Freeman* (1), "be final and conclusive"; it must also be as complete as it can be in the Courts of the country where it is pronounced. If it can be shown to be final, conclusive, and as complete as possible, the Courts of the United Kingdom will take cognizance of it as a basis for a new action.

The plaintiff in the action before us was married in Ireland to a man named Alexander M'Donnell. The married couple went to America, lived first in New York, and afterwards went to the State of Montana, where they lived together for a short time. The husband seems to have treated his wife with gross cruelty, and in March, 1911, she brought an action against him in the District Court of the Third Judicial District of the State of Montana, in and for the County of Deer Lodge. The action so brought is one which is unknown to our jurisprudence. It was an action for maintenance, without asking either for divorce or separation. It was commenced by a pleading called a complaint, in which the facts were alleged by the plaintiff "for cause of action." The complaint was, by order of the Court, served on the defendant, with a summons to answer. The prayer of the complaint asked:—1, That the defendant be required to pay into the office of the clerk of the above entitled Court for

(1) 15 A. C. 1.

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the maintenance and support of the plaintiff the sum of 75 dollars per month, or such other sum as the above Honourable Court might deem reasonable; and, 2, that the said defendant be required to pay by the decree and judgment of the above entitled Court for the permanent support and maintenance of the plaintiff herein the sum of 75 dollars per month. There were other matters prayed for in the complaint, but with these we need not trouble.

The defendant did not appear. The case was tried out at length; witnesses were examined; and finally a rather elaborate order was made by the Court, which, after reciting a number of matters, ordered, adjudged, and decreed that the defendant do pay into the office of the clerk of the above entitled Court on the 8th day of April, 1911, the sum of 40 dollars for the support and maintenance of the above-named plaintiff, and that he further pay on the 8th day of each and every month after the said 8th day of April, 1911, the sum of 40 dollars per month for the support and maintenance of the above-named plaintiff, and that such payments be made until further order of the Court.

This, it is contended, was not a final, conclusive, and complete judgment. It is first of all suggested that, inasmuch as the order for payment was only effective until further order of the Court, it was not a final order, as the Court would have power to rescind or vary the said order on a proper case being made before them. If it were possible in a case of this kind to make any other order, I should possibly be compelled to hold that this order was not final, but the very nature of the proceeding is such that ex necessitate there must be an opportunity left, possibly to rescind and possibly only to vary it. An order made by any Court for maintenance would not satisfy justice if there were not a power left to the Court to make changes in it, if the maintenance directed to be paid became in part or wholly unnecessary. If this order cannot be treated as a final and conclusive order, because of the possible necessity in the future of varying it, then there never can be a final and conclusive order in a suit for maintenance—a proposition which seems to me quite untenable.

It is secondly argued that the direction that the money should

be paid into Court prevented it from being a final order—made it, in fact, interlocutory; and the case of *Paul* v. *Roy* (1) was quoted as supporting this contention. Now, it will be found on looking into that case that the learned Judge who made the order did not at all decide that the mere fact of money being ordered to be paid into Court prevents the order being final and conclusive. The conclusion he came to was that it was clear from the order itself that the sum of money to be paid into Court was to be held by the Court, and to be disposed of in accordance with a judgment thereafter to be given. In those circumstances, of course, the order was neither final nor conclusive, inasmuch as the Court had come to no decision as to the final apportionment and disposal of the money.

In the western States of America life is a shifting thing. Men and women move about in a way which is not at all understood here, and it is probable that the only way in which the money directed to be paid would be sure of reaching the hands of the person entitled to it would be to order it to be paid into the office of the clerk of the Court to be held at the disposal of the person entitled thereto. There is nothing in the order from which it might even be inferred that the money that was paid in was to be at the disposal or under the control of the Court itself, and it must therefore be assumed that whenever the complainant made an application to the clerk of the office to have the money paid out, it would have been paid out to her as a matter of course; nor do I think the Court had any power to prevent such payment out at any time. All the Court could do, if application was made to it, was to vary the amount. I do not agree that a mere order to pay into Court without any indication that the Court had or desired to exercise any control over the money prevents the order being a final and conclusive one. I regard the payment into Court as mere machinery for paying the complainant, and probably the best machinery that could be employed for such purpose in the circumstances.

It has further been suggested that the alternative claim in the prayer of the complaint shows that the Court could have made two different kinds of orders, one by which the money would be

(1) 15 Bev. 433.

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paid into Court, and held, or paid out by the Court, pending further order; another by which they would make, once and for all, an order decreeing the payment of a certain sum for the permanent support and maintenance of the plaintiff. I do not so understand these two prayers, and, indeed, the latter suggestion seems to me absurd. I think the first prayer is merely for a finding that the plaintiff was entitled to a sum per month, and that the second prayer was for judgment for the payment of the said sum. These were the three points made by Mr. Best on behalf of the defendant.

Now, in form, the order made by the Court of Montana was a plenary order deciding the suit. I have already shown that, in its very nature, there must be a power left in the Court if application is made to it, and if the reasons adduced are sufficiently strong, to vary the order. It does not make the order any less a final judgment in a suit than liberty to apply in a suit in Chancery makes the judgment in that suit anything less than final and conclusive.

As to the second point, namely, the order to pay into Court; that will only prevent the judgment from being a final judgment if the Court keeps control of the money when paid in, and it is clear to me, from the terms of the order, that the Court in this case never meant to, and did not in fact retain such control, and that, until the order was varied, whatever was paid in would be paid out on the mere application of the plaintiff at the office of the clerk of the Court.

As to the third point, in my opinion the two prayers in the complaint, which I have referred to, do not point to two different forms of order, but merely point to the order being made up as a judgment by the Court.

Immediately after the making of the order, the defendant made away with his property in Montana and escaped to Ireland. There was, of course, power in the Court in America to issue execution against him, but there was nothing on which to levy execution. If the Courts in this country had recognized the American order as a final judgment, the plaintiff in this suit could at any time have brought an action before the Irish Courts, based on the American order, and have recovered

whatever was then due to her. It is admitted that if she had at the end of a year applied to the Court in Montana for judgment for the amount that had become due to her during the year, such judgment could have been sued upon in Ireland. In my opinion, if she had done so, the American Court would have told her she had her judgment, and they could do nothing further for her. But if, in fact, they had acceded to her application, the absurd position would have arisen that in order to make the American decree effective the plaintiff would have had to apply each year for a judgment from the American Courts, and then come over and sued on it in Ireland. That, I suppose, is the law if the judgment is not final.

By the comity of nations, Courts will attempt to give effect to a definite judgment of a foreign Court where it is possible, and to the extent it is possible. Where a judgment for a definite sum of money is obtained, the Court will give effect to it where it is evidently final and conclusive, and it will also give effect to any final judgment, so far as it is final, and can be acted on.

In my opinion, this is a final and conclusive judgment, not for a definite single sum of money, but for definite sums to be paid as ordered. Whenever a sum became due under the order, the judgment became complete and final for that sum, and if for more than one sum then for the total of all the sums which so became due, up to the date of action. That aggregate amount would, in my opinion, be recoverable in an action on the judgment brought in this country. I think Mr. Justice Samuels was quite right in coming to the conclusion at which he arrived.

The only other argument urged by Mr. Best is based on the defendant's plea of plene administravit. That, I think, is untenable. The executor has vested in him a reversionary interest in a farm of some value. He clearly has not fully administered the property, and that plea must fail. He could have already sold the reversionary interest, or can sell it now.

The order, in my opinion, that should have been made (I think that the order of Mr. Justice Samuels, though it is not quite complete in form, is sufficient as it stands) was an order on the executor to pay both claim and costs de bonis testatoris. Whenever the executor realizes the property which is still

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unrealized, he will, in my opinion, be entitled, in the first place, to pay himself the costs of these proceedings, but the balance will then be assets in his hands, out of which, so far as they go, he should pay the claim and the costs of the plaintiff in this action. Subject to such an amendment in the form of the order as I have suggested, I think the application for a new trial should be dismissed with costs.

MOLONY C.J. :—

I agree with my brother Gordon. [His Lordship, having stated the facts as above set out, proceeded :—]

The defendant has relied on plene administravit as an answer to the entire action ; that he has received no assets of the deceased, and that the £475, at which the assets were sworn, was represented by a reversionary interest in a farm which passed under the will of James M'Donnell, the father of Alexander M'Donnell, to the said Alexander M'Donnell. It was contended by the plaintiff that on the true construction of this will a present interest was vested in the deceased, and passed to the defendant, but it is unnecessary to discuss that in the present case, because it is clear that where a chattel interest or freehold registered land, which descends as personalty, is bequeathed to A for life and afterwards to B, who dies before A, although B never had the term vested in him, it shall be assets in the hands of his executor (Wentw. Off. Ex., 188, 14th ed., Com. Dig. Assets, (C)). The executor consequently having assets, and the debt of £66 19*s.* 10*d.* being admitted, there must be judgment for that amount in any event.

But the defendant strongly contends that the judgment of the American Court is not a judgment of a nature which can be sued on in this country. In order to enforce a judgment of a foreign Court in this country, it must be final: *Nouvion* v. *Freeman* (1). Lord Herschell in that case said, at page 8 :— "Now there can be no doubt that in the Courts of this country effect will be given to a foreign judgment. It is unnecessary to inquire upon what principle the Court proceeds in giving effect to such a judgment, and in treating it as sufficient to establish the

(1) 15 A. C. 1.

debt. Reliance was placed upon a dictum by Parke B. and Alderson B. in the case of *Williams* v. *Jones* (1), where the law is thus stated: 'Where a Court of competent jurisdiction has adjudged a certain sum to be due from one person to another, a legal obligation arises to pay that sum on which an action of debt to enforce the judgment may be maintained'; but it was conceded, and necessarily conceded, by the learned counsel for the appellant that a judgment to come within the terms of the law as properly laid down must be a judgment which results from an adjudication of a Court of competent jurisdiction, such judgment being final and conclusive." He subsequently said, at page 9: "I think that in order to establish that such a judgment has been pronounced, it must be shown that in the Court by which it was pronounced it conclusively, finally, and for ever established the existence of the debt of which it is sought to be made conclusive evidence in this country so as to make it res judicata between the parties. If it is not conclusive in the same Court which pronounced it, so that notwithstanding such a judgment the existence of the debt may, between the same parties, be afterwards contested in that Court, and upon proper proceedings being taken and such contest being adjudicated upon, it might be declared that there existed no obligation to pay the debt at all, then I do not think that a judgment which is of that character can be regarded as finally and conclusively evidencing the debt, and so entitling the person who has obtained the judgment to claim a decree from our Courts for the payment of that debt." And Lord Watson, referring to the cases of *Godard* v. *Gray* (2) and *Schibsby* v. *Westenholz* (3), said, at page 13:—"The English cases to which I have already referred establish a more liberal rule in regard to the enforcement of foreign judgments than is to be found in the older authorities; but no decision has been cited to the effect that an English Court is bound to give effect to a foreign decree, which is liable to be abrogated or varied by the same Court which issued it . . . In order to its receiving effect here, a foreign decree need not be final in the sense that it cannot be made the subject of appeal to a higher Court;

(1) 13 M. & W. 628–633.
(2) L. R. 6 Q. B. 139.
(3) L. R. 6 Q. B. 155.

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but it must be final and unalterable in the Court which pronounced it, and if appealable the English Court will only enforce it subject to conditions which will save the interests of those who have the right of appeal."

In the present case it lies upon the plaintiff to establish that the order upon which she relies brings the case within the class of foreign judgments which can be enforced here. The case of *Paul* v. *Roy* (1) shows that an interlocutory order for payment of money into Court is not such a judgment as would be enforced. No evidence was given as to the law in Montana, and in the absence of such evidence I think it is clear that the object of requiring the money to be paid to the Clerk of the Court, and not directly to the plaintiff, was that the Court might retain control over the money, or be in a position to vary the order, or substitute another order, or abrogate it altogether in case facts were brought to their notice which would justify their intervention. I am not satisfied that this judgment is a final and conclusive judgment within the meaning of the authorities, and I think the plaintiff has failed to discharge the onus of proving that the judgment is final and conclusive.

The result is that, in my opinion, the finding of Mr. Justice Samuels, that the whole amount sued for was due, cannot stand, and that judgment should be entered for the plaintiff for the sum of £66 19*s.* 10*d.*, with costs of action, except in so far as the costs were increased by including in the claim the sum of £480, alleged to be due under the American order, and that each party should abide their own costs of this motion; the £60 lodged as security to be paid out to the plaintiff.

Solicitor for the plaintiff: *Charles Laverty.*

Solicitors for the defendant: *R. E. Bailie & Co.*

H. J. M'C.

(1) 15 Bev. 433.

[See *Harrop* v. *Harrop* [1920], 3 K. B. 386, reported since this case was heard.—ED.]

M'HUGH *v.* M'GOLDRICK (1).
(1920. No. 6945.)

Appeal.
1920.
Nov. 16.

Practice, Appeal—From remitting order after security for costs had been fixed on plaintiff's application.

A remitting order was made by the King's Bench Division unless the plaintiff, within ten days, gave security for the defendant's costs to the satisfaction of a Master. On the application of the plaintiff, the amount of the security was fixed. Subsequently plaintiff served notice of appeal against the remitting order.

Held, that the plaintiff, having elected to act upon the order, could not appeal against it.

APPEAL by the plaintiff from an order of the King's Bench Division, dated October 13th, 1920, remitting the trial of the action to the Recorder of Belfast unless within ten days the plaintiff gave full security for the defendant's costs to the satisfaction of a Master. On October 21st one of the Taxing Masters, on the application of the plaintiff, fixed the amount of the security for costs at £100, and on November 3rd notice of appeal was served by the plaintiff against the remitting order.

J. M. Whitaker K.C. (with him *P. O'Donoghue*), for the respondent:—

We submit by way of preliminary objection that this appeal cannot be entertained, inasmuch as the plaintiff has, by his application to the Master to measure the security for costs, acted on and adopted the order made by the King's Bench Division: *M'Cullough* v. *Munn* (2).

Kerr, for the appellant:—

If the plaintiff had waited till his appeal was disposed of, the time allowed for lodging security for costs would have elapsed. He was bound to give security within ten days in order to keep the action in the Superior Court. The defendant was in no way

(1) Before SIR JAMES CAMPBELL C., and RONAN and O'CONNOR L.JJ.
(2) [1908] 2 I. R. 194.

Appeal. 1920.

M'Hugh v. M'Goldrick.

prejudiced by the action taken by the plaintiff. *M'Cullough* v. *Munn* (1) has no application. *Armstrong* v. *Armstrong* (2) is an authority in support of the appellant.

Sir James Campbell C.:—

This is an interesting point, but we do not think there is any substance in it. An order was made against the plaintiff on October 13th remitting the trial of the action to the County Court, unless within ten days he gave security for costs to the satisfaction of the Master. The plaintiff was entitled either to submit to that order or to appeal from it. He accepted it, inasmuch as he moved before the Master on October 21st to have the amount of the security fixed; and it was fixed by the Master at the sum of £100; that is to say, not only the plaintiff but the Master proceeded to act on the terms of the order made by the Court below. It is now suggested that, having taken this step, which was a deliberate adoption of the order of the King's Bench, he is entitled to sustain the appeal on the ground that had he not complied with the order within ten days he might, although successful in this Court, be deprived of his right to keep the action in the Superior Court by lodging security for costs. That is not right, because in interlocutory appeals this Court invariably and, as a matter of course, extends the time for entering an appearance or delivering pleadings where the interval allowed by the rules has been exceeded on account of the delay caused by the appeal. In the same way a plaintiff appealing to this Court against an order of remittal will, if successful, be allowed an extension of time for giving security for costs if he asks for it. On these grounds we think that the plaintiff, having elected to act upon the order, cannot now appeal against it.

Ronan and O'Connor L.JJ. concurred.

Solicitor for the appellant: *P. J. Magee.*
Solicitors for the respondent: *Joseph Donnelly & Co.*

C. L.

(1) [1908] 2 I. R. 194.

(2) [1901] 2 I. R. 267.

HEPENSTALL *v.* COUNTY COUNCIL OF WICKLOW.

Appeal.
1920.
Nov. 17.
1921.
Jan. 19.

Malicious injury—Destruction of building—Covenant by lessee to deliver up in good repair—Measure of compensation to lessee.

Where the property of a lessee or tenant liable under covenant to keep and deliver it up in good and tenantable repair, and whose term could be determined by a six months' notice to quit, or was about shortly to expire, is maliciously destroyed, the measure of compensation under the Criminal Injuries Code is the cost of reconstruction.

So *Held* by the Court of Appeal (Sir J. Campbell C. and Ronan L.J., O'Connor L.J. dissentiente).

CASE STATED by Gibson J. at the Summer Assizes, 1920, for the County of Wicklow.

This was an appeal by the applicant from an order of the County Court Judge of Wicklow, dated 9th June, 1920, on the ground of insufficiency of the amount awarded for the malicious destruction of a vacated police barrack. Mr. Kingsmill Moore appeared for the applicant; the County Council were not represented. The award was for £400 and costs.

The facts were as follows:—The premises which had been destroyed had been demised by Lord Wicklow in 1833 to Farrell by lease for lives, which had dropped, at the yearly rent of £5 12*s.* 0*d.*, and a yearly tenancy on such determination was in being on the former terms at the time of the malicious injury. Wren, then owner of the lessee's interest, demised the premises to Sir Andrew Reed for police purposes on 9th December, 1892, at the yearly rent of £20, with special powers to determine the tenancy, which powers have not been exercised. Wren's interest became vested in the applicant, who was thereby, on the one hand, liable to the head landlord for the yearly rent and performance of the contract terms so far as applicable to a yearly tenancy, and, on the other hand, was entitled to enforce the rent and obligations against the Constabulary authorities under the letting of 1892.

Appeal.
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HEPENSTALL
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The premises were situate in the county, and, though Miss Hepenstall thought that a higher rent might be obtained, I was of opinion and found as a fact that £20 a year was the fair permanent letting value if the premises were uninjured, whether let to the police authority or to any other tenant, and that no increase of such rent could reasonably be anticipated. The estimate for rebuilding the premises was £1,426, allowing a discount for new being substituted for old buildings, and for some exaggeration; the Council not being represented, I found that £1,200 should be allowed if the cost of reconstruction was the proper criterion of value.

Mr. Kingsmill Moore contended that the liability to repair, and deliver up in repair, fixed the reconstruction cost as determining the compensation to be awarded. I was of opinion that the compensation depended, particularly in the case of an unoccupied hereditament, on the damage to the reversioner's estate, and that, though the occupier might possibly measure his loss by what it would cost to make the premises again suitable for occupation—a different question, on which I abstained from expressing any opinion—in such a case as that before me the actual loss to the landlord's estate was the essential matter for consideration. I illustrated my view by premises originally costing £5,000 to build, and that it would take a like amount to restore. Such buildings in the process of time, from change of character of neighbourhood, or otherwise, might have permanently depreciated in value, or have been let in tenements, so that they would only be sold at a sum representing their then present reduced value. They might let at a rent or rents of, say, £50 a year altogether without any prospect of increase. I thought that in such case the landlord could only recover the amount of his real loss—a sum corresponding with the true present saleable value of the property. He could not demand in the example given £5,000, which, at 5 per cent., would yield £250 a year as compared with £50 rent, the actual permanent letting value of the premises. Much of the house property in Dublin consists of mansions once occupied by persons of position, and now degenerated into slum tenements. If breach of covenant to repair or deliver up in repair entailed liability to rebuild and restore, the landlord could turn the breach of

covenant into a means of getting a profit quite beyond the saleable value of the property if the covenant had been fully satisfied or had been specifically performed by re-erection. Where the premises are sub-let, and the covenants binding the middleman and the sub-tenant are not identical, the difficulty is obvious.

In the present case Lord Wicklow did not apply for compensation. If the middle interest would expire in a year or two, could the middleman always be entitled to damages as if the premises were to be rebuilt by him, or would he be confined to the true damage sustained by him? As the point is important, and Mr. Kingsmill Moore said that decisions at Assizes and elsewhere have proceeded on this view, I agreed at his instance to state a case. The order under appeal, lease by Lord Wicklow, and letting to the police authority are to be taken as incorporated with and forming part of this case. My decision was that the award of the County Court Judge was right as to amount, and should be affirmed.

The question for decision of the Court of Appeal is as follows:—Was the applicant entitled to have compensation assessed on the basis that the cost of rebuilding was the determining criterion or factor irrespective of the actual present value, assuming that the premises had been kept in repair or rebuilt, and there had been no breach of contract terms?

If the answer is affirmative, the order is to be varied by substituting £1,200 for £400, with £13 10*s.* 0*d.* costs and £2 expenses of appeal. If the answer is negative, the order is to be affirmed without costs of appeal.

The lease of 1833 contained the following covenant by Brian Farrell, the lessee: "And also shall and will from time to time, and at all times during the continuance of this demise, well and sufficiently preserve, uphold, maintain, repair, and keep the said demised premises . . . in good, sufficient, and tenantable order, repair, and condition, and at the end of said term or other sooner determination of this, whichever shall first happen, shall and will leave and yield up the quiet and peaceable possession thereof unto the said William Howard, Earl of Wicklow, his heirs or assigns, in like good and sufficient tenantable order, repair, and condition."

Appeal.
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Gibson K.C. and *Kingsmill Moore* (with them *Sealy K.C.*), for the applicant:—

The selling value of the applicant's interest is not the criterion of the compensation to which she is entitled. It is the value of the property to its owner, and not its value to a purchaser, which ought to be considered; and it is submitted that the applicant is entitled to have the premises restored to the state in which they were immediately before their destruction: *Noblett* v. *Leitrim County Council* (1); *Worthington* v. *Tipperary County Council* (2). Had Lord Wicklow claimed compensation, it is submitted that the measure of compensation to him would have been the cost of restoration—*The Duke of Newcastle* v. *The Hundred of Broxtowe* (3)—subject to a reasonable allowance on account of new buildings in place of old: *Yates* v. *Dunster* (4).

The applicant is bound by covenant to keep and deliver up the premises to Lord Wicklow in good tenantable repair, and her liability thereunder cannot be disregarded or in any way discounted in assessing the compensation which she ought to receive. The measure of damages in an action against her for breach of the covenant would be the cost of putting the premises into the state of repair required by the covenant: *Morgan* v. *Hardy* (5); *Joyner* v. *Weeks* (6); *Henderson* v. *Thorn* (7); *Conquest* v. *Ebbetts* (8).

Economic or other considerations rendering it improbable that Lord Wicklow would rebuild the premises cannot properly be urged in reduction of the applicant's liability in such an action, and they are, we submit, irrelevant upon the assessment of compensation under the Criminal Injuries Acts.

The County Council was not represented.

1921.
Jan. 19.

SIR JAMES CAMPBELL C.:—

The question for decision in this case is upon what principle compensation is to be awarded under the Criminal Injuries Code for the malicious destruction of house property in cases where the claimant is a lessee or tenant, bound by contract, express or

(1) [1920] 2 I. R. 143.
(2) [1920] 2 I. R. 233.
(3) 4 B. & Ad. 273.
(4) 11 Ex. 15.
(5) 17 Q. B. D. 770.
(6) [1891] 2 Q. B. 31.
(7) [1893] 2 Q. B. 164.
(8) [1896] A. C. 490.

implied, to keep and deliver up the premises in good repair. I do not think it necessary to discuss or review the authorities at any length, as I am satisfied they compel us to decide that the true principle to be applied in such cases as the present is as stated in Mayne on Damages in the following words :—" When the action is brought upon the covenant to repair at the end of the term the damages are such a sum as will put the premises into the state of repair in which the tenant was bound to leave them." This proposition was adopted and applied by Denman J. in *Morgan* v. *Hardy* (1); by the Court of Appeal in England in *Joyner* v. *Weeks* (2); and by Wills and Lawrance JJ. in *Henderson* v. *Thorn* (3). In *Joyner* v. *Weeks* (2) it was found that the lessor, pending the expiration of the defendant's term, had granted a new lease to a third person, to date from such expiration, and that this new lease was at an increased rent, and contained covenants for the expenditure of £200 in alterations and for the keeping of the premises in repair. It was consequently contended for the defendant that, owing to the existence and terms of this new lease the lessor would be entitled to have the premises put in repair, and had therefore sustained no loss by the breach on the part of the defendant of his covenant to repair; but the Court of Appeal rejected this contention, holding that it afforded no answer to the defendant's breach of covenant under which his lessor was entitled to such damages as would affect the restoration of the premises.

But the question is, in my opinion, placed beyond the region of controversy by the subsequent decision of the House of Lords in a case in which the facts very closely resembled those of the present case. I refer to *Conquest* v. *Ebbetts* (4). In that case a lease contained covenants by the lessee to keep the premises in repair, and to deliver them up in good repair. A sub-lease was granted, containing similar covenants on the part of the sub-lessee, with notice to him of the original lease. An action by the lessee against the sub-lessee for damages for breach of his covenant to keep in repair was brought about three and a half years prior to the date of the determination of the sub-lease, this date being ten days prior to the date of the expiration of the

(1) 17 Q. B. D. 770.
(2) [1891] 2 Q. B. 31.
(3) [1893] 2 Q. B. 164.
(4) [1896] A C. 490.

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original lease, and was referred to the Official Referee for an assessment of the damages. He arrived at the amount by ascertaining how much it would require to put the premises into the state of repair in which they would have been had the sub-lessee performed his covenant, and then allowing a rebate from that sum in consideration of the fact that the sub-lease had still three and a half years to run. It was held by the House of Lords, affirming the Court of Appeal, that the Referee had assessed damages on the correct principle, and that his award should be upheld. All the authorities bearing on the question were fully and elaborately reviewed, counsel for the appellants admitting that had the action been for damages at the expiration of the lease for breach of the covenant to deliver up in repair, the true measure would be the cost of restoration, but contending that where the action was brought during the currency of the lease for failure to keep in repair, the true measure was the injury to the reversion. It was held, however, that where the action was brought by the sub-lessor at a date when the lease was nearly run out, regard must be had in assessing the damages to the liability of the sub-lessor under the covenants of the original lease. Lord Herschell in his judgment deals with the suggestions that were made by Gibson J. in the case stated and repeated before us, that the original lessor on the termination of the lease might utilize the site at greater advantage for some other purpose, or might prefer to have the holdings upon it removed altogether, or might compound with his lessee for a sum less than the cost of restoration, and says that the Court would not do right in assessing damages to involve itself in considerations of such a character. For myself, I can see no limit to the speculations in which a Court must indulge once we depart from the terms of the contract into which the parties have entered, by the express terms of which the lessee covenants to deliver up the premises in good repair. I know of no case—and certainly none has been cited—in which upon the determination of the lease it has ever been held that such considerations or speculations are relevant to any ascertainment of the lessee's liability, while *Joyner* v. *Weeks* (1) and *Conquest* v. *Ebbetts* (2) are direct authorities to the contrary.

(1) [1891] 2 Q. B. 31.

(2) [1896] A. C. 490.

The position in the present case is even stronger in favour of the appellant, because she is bound by the terms of her letting to keep the premises in repair for the sub-tenant, while she is, in addition, bound under the terms of her own tenancy, which may be determined at any time by notice to quit, to deliver up the premises in good repair, and this she could only do at the cost of restoration. This being the true measure of her own liability, it would be a denial of justice if she were not in this present proceeding fully indemnified in respect of it. It has recently been decided in several cases in this Court that the compensation to be awarded under our Criminal Injuries Code must be measured on the basis of restitution, and that would be denied in the present case by an award of anything short of the cost of restoration. In *The Duke of Newcastle* v. *Broxtowe* (1) it was decided that, under the analogous provisions of the English Act (7 & 8 Geo. 4, c. 31), the owner of premises maliciously demolished was entitled to recover from the hundred the amount necessary to replace the holding; and the Court declined to yield to the argument that this amount should be discounted by regard to any consideration of the owner's unwillingness to make it his residence, or its alleged unsuitability for such a purpose.

It does not appear from the report of that case whether the tenants to whom the Duke's castle had been let held under leases, or whether, if they did, these leases contained the usual covenant on the part of the lessees to keep and deliver up the premises in good repair; and, in the absence of any reference to them in the judgment of Parke J., I would infer they did not, and that the decision is an authority for the application of this principle of restoration to cases in which the claimant is the owner in fee. In any event the other cases I have cited seem to conclusively establish that where the premises are in the occupation of a lessee or tenant bound by contract, express or implied, to repair, the latter, if the applicant, is entitled to compensation to be ascertained with due regard to his obligation under this contract. The award of Gibson J. cannot be sustained, and must be increased to the sum of £1,200.

(1) 4 B. & Ad. 273.

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RONAN L.J.:—

The lease of 1833 contained covenants by the lessee, 1, to keep the premises in repair, and, 2, to deliver them up in repair. The case states that this lease had expired, "and a yearly tenancy on such determination was in being on the former terms at the time of the malicious injury." Therefore these covenants were terms of the yearly tenancy. Wren was the owner of the yearly tenancy in 1892, and he made the letting to Sir A. Reed, which was determinable by three months' notice by either party. The agreement provided that the lessor should keep the premises in repair. The applicant is the assignee of Wren's interest. She can by three months' notice put an end to her liability to repair under the agreement of 1892, but she thereby loses the rent of £20. On the other hand, she is liable to Lord Wicklow on both the covenants. If he chooses to serve a notice to quit, at its expiration he can sue her on the second covenant. He can at any time sue her on the first. In my opinion the second covenant is the important one in the present case.

In an action on a covenant to keep in repair, the measure of damage may be either the cost of the repairs or the diminished value of the reversion by reason of the non-repair. See the judgment of Palles C.B. in *Metge* v. *Kavanagh* (1). In an action on the covenant to deliver up in repair, the measure of damages is the sum it would take to put the premises in the state of repair in which the lessee ought to have left them according to the terms of his covenant. In the case put by Gibson J.: If a house costing £5,000 would not, owing to depreciation of the district, be let for a rent which would be any return for such an outlay, it may well be that it would not repay the landlord to rebuild the house. If he recovered the sum as damages which it would cost to rebuild, he would no doubt make a profit by the covenant. But does this relieve the tenant from liability for not having performed his absolute covenant according to its tenor?

Gibson J. seems to suggest that the measure of damages is what the landlord's actual loss is by reason of the breach of covenant, or what is the diminution in the value of the

(1) I. R. 11 C. L. 431.

reversion. I know of no authority in which such a principle has ever been applied in the case of a covenant to deliver up in repair. There is no question here of the extent of repairs. It is a case of total destruction. The cases are collected at pp. 229 and 230 of the 5th ed. of Foa. The case of *Proudfoot* v. *Hart* (1) referred to in the note only deals with the class of repairs. These cases clearly establish that the actual loss to the landlord or the injury to the reversion is not the measure of damages in such an action. I, therefore, am of opinion that the direct result of the malicious injury was to place the applicant under an obligation to Lord Wicklow to rebuild the house, or to pay him the cost of rebuilding, capable of being enforced by a notice to quit and an action for breach of covenant, to which she has no defence. The action in *Conquest* v. *Ebbetts* (2) was for breach of covenant to keep in repair. No question arose as to the measure of damages for the breach of the covenant to deliver up in repair. This, of course, makes the observations in the case infinitely stronger when applied to the present case.

More than twenty-five years ago in the case of *Re Ryan* (3) the liability of a tenant from year to year under a covenant to keep in repair was held to entitle him to compensation. This seems to me a clear authority. The case is referred to at p. 46 of Moloney & Lee's book, and it does not appear to have ever been questioned. As a decision of Palles C.B., it is, of course, of great weight. On these grounds I am of opinion, 1, that the law is settled that the measure of damages in an action for breach of covenant to deliver up in repair is in the ordinary course the cost of restoration of the premises; and, 2, that this is the measure of compensation in the present case.

O'CONNOR L.J.:—

A vacant police barrack having been maliciously destroyed, the applicant claims damages for its destruction. It had been let by the applicant to the police at the rent of £20 a year, the applicant undertaking the repairs. The applicant holds the premises under

(1) 25 Q. B. D. 42. (2) [1896] A. C. 490.
(3) 31 I. L. T. & S. J. 366.

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a tenancy from year to year at a rent of £5 12*s.*, a lease for lives, made to her predecessor by Lord Wicklow in 1833, having expired. The lease contained a covenant binding the lessee to keep and yield up the premises to the landlord in repair, and, of course, the obligation to repair and yield up in repair is now an implied term of the tenancy from year to year.

The learned Judge finds as a fact that £20 a year is the full letting value of the house, either now or in the future. It is not suggested, nor could it seriously be suggested, that the building was to Lord Wicklow, or to the applicant, of any value save as a rent-producing asset. Gibson J. thought that £400 was the full value of the rent-producing asset. It is, however, contended that the cost of replacement (£1,400) is the real measure of damages. If that is so, the applicant is to receive, allowing a discount of new for old, £1,200; out of which the head landlord must receive his share if the premises are not rebuilt. Of course the premises will not be rebuilt, as nobody in his senses would think of investing £1,400 or £1,200 in buildings to produce him £20 a year, when, by investing £1,200 in Government securities, he can get at present prices £72 a year. If we are bound by the replacement measure of damages, the head landlord and the applicant between them will be nearly four times as well off as they were before. The case is of very great importance, for there has been, unfortunately, much destruction of buildings in Ireland, and in some cases replacement value will bring in an income of ten or even twenty times the former yield of the premises. The result shocks one's common sense; but it is said that we are constrained to it by principle and authority. I am of opinion that we are not.

This Court has laid down, in cases of malicious damage, that the County Council is in the same position as if it were the actual doer of the malicious injury, and the defendant in an action brought to recover damages therefor; there is this qualification, that vindictive damages cannot be recovered; but no question as to that arises in this case.

Let me, in the first place, deal with the case on the supposition that the applicant was owner in fee of these premises. It is said that we are bound by the principle of *The Duke of Newcastle*

v. *Hundred of Broxtowe* (1) to award replacement value. If that case lays down any inflexible rule of the kind, I must, with all due deference, refuse to follow it; for I have satisfied myself, and I shall, as briefly as I can, endeavour to show, that replacement value in respect of damage to buildings, or the freehold—for, of course, they come to the same thing—is not a universal test of damages; I shall try to show it as a matter of principle; and I shall adduce several cases, including one actual decision of the House of Lords, in support of the position I take up on this matter.

Where a thing is destroyed, as the result of a trespass, what is the principle for the ascertainment of damages? It is this, that we are to put the owner of the thing in the same position, so far as we can, as he was in before: see observations of Lord Atkinson in *Werththeim* v. *Chicoutimi Pulp Co.* (2), and of Lord Haldane in *British Westinghouse Electric and Manufacturing Co., Ltd.*, v. *Underground Electric Railways of London, Ltd.* (3)—cases, no doubt, of contract; but the observations apply equally to cases of tort; see also observations of the Lord Chancellor in *Worthington's Case* (4). Save this principle, I think no absolute rule exists, or can be laid down.

We are, in my opinion, apt to be led into error if we allow our minds to be diverted from principle by discussions on particular facts and by observations of eminent Judges evoked by these facts. In this connexion, I beg leave to quote a passage from Lord Haldane's judgment in *British Westinghouse Electric and Manufacturing Co., Ltd.*, v. *Underground Electric Railways of London Ltd.* (2): "In some of the cases there are expressions as to the principles governing the measure of general damages which at first sight seem difficult to harmonize. The apparent discrepancies are, however, mainly due to the varying nature of the particular questions submitted for decision. The quantum of damages is a question of fact, and the only guidance the law can give is to lay down general principles which afford at times but scanty assistance in dealing with particular cases. The Judges who give guidance to juries in these cases have necessarily to look at their

(1) 4 B. & Ad. 273.
(2) [1911] A. C., at p. 307.
(3) [1912] A. C. 689.
(4) [1920] 2 I. R. 233.

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special character, and to mould, for the purposes of different kinds of claims, the expression of the general principles which apply to them, and this is apt to give rise to an appearance of ambiguity." (As to the difficulty of laying down any general rule, see Lord Halsbury's observations in *The Mediana* (1).) Now, the principle I have stated is an absolute principle; there is no exception to it; it applies to things of every kind, to the freehold and buildings as well as to chattels, for there is no magic about clay or bricks as mortar. Difficulties, of course, arise when we have to apply the principle to the facts of a particular case so as to come to a decision upon it.

Inasmuch as we are to put the owner of the thing destroyed, as far as money can, in a position as good as—and not better than—his position before its destruction, we have to ask ourselves what was the value of the thing, not merely its value in the abstract, but its value to its owner; and then we must try to put a money equivalent on such value. There's the rub; for in determining the value to the owner there is scope for variety as immense as the works of nature or man. We must look, of course, at the substance and quality of the thing itself. Is it a thing easily replaced? In very many cases that will solve the problem. We must measure, in many cases where it cannot be replaced, its more or less desirability, including, it may be, a special value it had for the owner and for no one else; and in weighing its value there is no surer mark of value than the use the owner has made of it; for its daily or yearly use, in most circumstances at any rate, is the measure of value which by his own action the owner invites us to put upon it.

Now, if I am right in saying that the problem in the case of a building is to be solved in the same way as the problem in the case of a chattel—and the cases which I shall cite presently, as well as the reason of the thing, show, as I think, that I am right—what follows? The tribunal has to see what the building is, its nature and quality, how has it been used, is it a mere money-producing entity in the hands of the owner, or is it a building which, for one reason or another—to gratify a natural sentiment or to preserve amenity of a demesne or estate—the owner would

(1) [1900] A. C., at p. 116.

preserve, or, if destroyed, would restore? Suppose it be admitted by the claimant for damages that the building is a mere money-making unit, and that when he gets the compensation he will not restore the building, is the tribunal, notwithstanding the admission, to give him a sum which, invested in Government securities, will quadruple his previous income? And what difference is there between that case and a case like the present, where the facts lead to the same conclusion as irresistibly as if there had been an admission? The present seems to me to be a case which well illustrates the injustice that the replacement measure of damage, inflexibly applied, may involve. Let me put, in support of my view, other illustrations. Are we to apply such a rule to the following cases:—a watermill or a windmill which changed industrial conditions have rendered, for all time, useless save as a cattle shelter; a decayed old mansion left derelict for years—I know of several that have been, for sale purposes, stripped of roofs and mantelpieces and woodwork by the owners, who have abandoned them, and who have found themselves unable to let them even at a nominal rent; an old castle, possessing neither beauty nor antiquarian interest, converted into a cottage dwelling for a day labourer, or, it may be, into a pigsty or a chicken coop; the gazebo or folly which the caprice or vanity of a half-crazy former owner has erected at great cost, which advantages neither man nor beast, and which the present owner would cheerfully pay to have removed from his offended sight; the house in the city an abode of the great a century ago, which it cost a fortune to erect, and which changing fashion and the decay of our capital have now reduced to a tenement house, bringing into the house-shark that owns it a small and precarious income, purchasable at any time for three or four years' purchase? For the reasons that I have indicated, I am of opinion, upon principle, that the replacement test is not a universal test, and that in a proper case—of which the present seems to me to be one—the circumstances and the justice of the matter require that it shall be rejected.

How does the matter stand upon authority? It is said that *The Duke of Newcastle* v. *The Hundred of Broxtowe*(1) is an authority that in all cases of this kind the cost of restoration is the measure

(1) 4 B. & Ad. 273.

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of damages. There, one of the Duke of Newcastle's old mansions or castles was destroyed by rioters. It had not been occupied by the family for more than a century, and there was some evidence that it had been unfit for such residence by reason of several steam engines having of late been erected near it, and of the then Duke having sold ground immediately adjoining to it, and having let portion of the park on building leases. At the date of its destruction the castle had been divided into two dwelling-houses, which together brought in a net rent of £171. Counsel for the plaintiff asked the jury to give damages on the basis of restoration, which would cost £31,280; counsel for the defendants on the basis of thirty years' purchase, that is, £5,130. The Judge left the question of damages to the jury generally, and the jury awarded £21,000. On a motion for a new trial the King's Bench refused to interfere with the verdict, and indeed approved of the method adopted by the jury of assessing compensation. On the facts, I have no quarrel with the decision, and I incline to think that the judgment of the Court must be taken to have reference to the facts. The jury probably knew the local circumstances, and were, one may be sure, very good judges as to how far this mansion or castle had degenerated into a money-making unit, or was fit either from history or family associations, or as a place of beauty or amenity, to be rebuilt and restored. But if it could have been proved that, just before the destruction of the castle, the Duke had offered to take £5,000 for it, I am sure the verdict and judgment of the Court would not have been for £21,000, but only for its real value.

Now, let me cite some cases which, as I think, clearly show that replacement is by no means a universal test. In *Jones* v. *Gooday* (1) the action was for trespass for cutting into the plaintiff's close and carrying away the soil. Tindal C.J. directed the jury to give such damages as they thought the plaintiff had sustained by the cutting into and carrying away of his land, and the jury having found £5 damages, the plaintiff moved for a new trial on the ground of misdirection, the contention being that the Judge ought to have directed that the plaintiff was entitled to such a sum, by way of damages, as would restore the land to the

(1) 8 M. & W. 146.

condition in which it was before the trespass. The rule was refused by Lord Abinger C.B., Alderson B., and Rolfe B.; Alderson B. saying :—"The plaintiff is entitled by way of compensation to what the land was worth to him. If the principle for which plaintiff's counsel contends were to be adopted, it would follow that a party who has let the sea in upon the land of another, the land itself being worth only £20, would have to pay by way of damages the expense of excluding it again by extensive engineering operations. The same argument, I remember, was urged in an action brought against the Regent's Canal Company; it was contended that they were bound to replace the soil they had taken away, or to pay such a sum in damages as would enable the plaintiff to do so. The jury, however, did not adopt that view of the case, and the Court refused to disturb their verdict."

In *Lodge Holes Colliery Co., Ltd.*, v. *Wednesbury Corporation* (1) a mine extended under a highway which was vested in the local authority. While working the mine the owners let down the surface of the highway, which the local authority in good faith and on the opinion of skilled advisers restored to its former level at great cost. An equally commodious road might have been made at less cost. It was held (reversing the Court of Appeal, in which Collins M.R. cited the *Duke of Newcastle's Case* (2) as an authority) that the local authority were not entitled to raise the road to the old level, cost what it might, and whether it was more commodious to the public or not, and were only entitled to recover from the mine-owners what it would have cost to make the equally commodious road. The Lord Chancellor (Lord Loreburn) remarked :—"The point of law which was advanced by the plaintiffs, namely, that they were entitled to raise the road to the old level, cost what it might, and whether it was more commodious to the public or not, will not, in my opinion, bear investigation. Such a rule might lead to a ruinous and wholly unnecessary outlay. There is no authority for it. Even those who have been wronged must act reasonably, however wide the discretion that is allowed to them within the bounds of reason." These cases seem to me to dispose of the suggested principle that in the case of a trespass to the freehold or buildings,

(1) [1908] A. C. 323. (2) 4 B & Ad. 273.

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the cost of replacement is the measure in all cases of the damages.

I have hitherto dealt with the case on the hypothesis that the applicant is owner in fee. She is, in fact, not owner in fee, but holds under a yearly tenancy, one of the terms of which is to keep in repair and yield up in repair at the end of the term. It is said, on her behalf, that she must either rebuild the destroyed premises, or else pay to the head landlord the cost of rebuilding them by way of damages for her breach. That raises a very important question. Is a tenant bound by covenant to yield up in repair, and who has not done so, bound, in every conceivable case, to pay as damages the cost of repair, or, in the case of complete destruction, of replacement? The general rule for assessing damages for breach of contract is that the party complaining should, so far as it can be done by money, be placed in the same position as he would have been in if the contract had been performed (per Lord Atkinson, in *Wertheim* v. *Chicoutimi Pulp Co.* (1).

Now, let me ask myself is that principle for assessing damages applicable to the case of a landlord suing his tenant for breach of his covenant to repair and yield up in repair? Wherefore not? Is there anything in a building to take such a case out of a rule founded on obvious justice and good sense? Surely not; as I have already said, there is no magic in bricks or mortar. Is there anything in the fact that the building is (subject to the term) the property of the plaintiff to compel us to substitute some other rule? Again, surely not; in the cases of trespass, for example, the property injured or destroyed is the property of the plaintiff; and, for another example, the rule applies to cases of bailment of a chattel, where the chattel is the property of the bailor, subject to the hire or bailment. Finally, is there something so sacred in the position of a landlord who contracts with his tenant that a different rule shall apply to him in fixing damages for the breach of the contract? Again, I say, surely not. I defy anyone, even though imbued with the exaggerated respect which our feudal traditions seem to have engrained in the jurisprudence of this country, to suggest any principle, consonant with justice, whereby such a differentiation can be supported.

(1) [1911] A.C., at p. 307.

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Accordingly, I proceed to apply Lord Atkinson's principle to this case. If Miss Hepenstall's house were accidentally (instead of being maliciously) burned, and Lord Wicklow, having determined the term, were to take an action against her because she did not rebuild the house, let me suppose the plaintiff, or his agent, in support of the action, in the witness-box, under cross-examination :—" My claim is for cost of replacement, to which I say I am entitled. That cost is £1,400, with a discount of £200 new for old; therefore my net claim is £1,200. All I have been able to get out of the premises is £5 12*s.* a year; and even if I had possession, I could not get more than £20 a year. If the jury give me £1,200, I shall not rebuild. Why should I? I have no interest in the premises save as a source of profit; I can obtain £72 a year out of Government securities for my £1,200. It would be insane of me to spend £1,400 to bring in a paltry £200 a year." In all seriousness I ask this question: Would the jury, in face of this evidence, be directed, as a matter of law, that they should give the landlord £1,200, and no less? To imagine such a thing is to imagine that our law compels to results that revolt common sense, and that are unjust to the point of grotesque absurdity.

Again, suppose that it were proved that, immediately before the destruction, the landlord had offered his interest, which, of course, would include the value of the covenant, out and out for £200, is it to be supposed that he can compel his tenant either to spend £1,400, or to pay him £1,200 on the building? And let me emphasize this. An admission is the best of proof; an offer such as I have illustrated is, of course, a species of admission; but there are many other sorts of proof quite as good for all practical purposes; and when the circumstances are such as to afford overwhelming proof that the landlord injured by the breach would not, in any conceivable circumstances, undertake the task of rebuilding, then, in my opinion, the tribunal is entitled, taking all the circumstances into account, to consider and say what the real money equivalent of his damages is. But it may be said, is not all this denying to the man what he bargained for? I think not. Unless in the special circumstances where specific performance or an injunction will be decreed, a man

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may break his contract; if he does break it, he has to pay damages; but the damages must be limited to the real money equivalent of the other party's loss; the other party cannot take advantage of the breach to make himself richer than if the contract had been performed.

It may be suggested, indeed, that the principle I struggle for deprives the plaintiff of a choice to which he is entitled. Does it? For I agree that to deprive a man of the exercise of a choice to which he is entitled—whether he shall put his damages into rebuilding or into some other form of security—is, in effect, to lop something off the bargain. But, then, what exercise of choice do we speak of? I think it must be a real, bona fide exercise. A pretended exercise of it will not do; if his real object is not to get the thing he bargained for at all, but to get money which he has not the faintest notion of putting into replacement, but means to put into his own pocket, thereby making himself four, five, or possibly ten times as rich as if the contract had been performed, he is not exercising his choice at all; he is merely taking advantage of the breach of contract to make a profit out of what, after all (as in the case of accidental or malicious destruction), may be the misfortune of another. But for the opinion of my colleagues in this case, and the expressions in the judgments of several Judges in cases to which I shall refer, I should have thought what I have stated is clear law; and, at any rate, it being my notion of what the law is, I feel bound to state it, with all due deference.

It may be objected that it is putting an unfair and indeed impossible burden on a tribunal to determine the possible or probable intention or future action of the plaintiff who sues for his breach, this being an over speculative inquiry. I fail to appreciate the difficulty. Inquiries just as speculative have to be made by a Judge or jury over and over again where the nature of the case requires it. What can be, in a sense, more speculative than the course of a disease caused by injury; or than the result of an accident on, say, a youth emerging into manhood; or than the loss of goodwill or profits; or than the money equivalent of the loss to a girl caused by breach of promise of marriage? And it must be remembered, on my hypothesis, that

the burden of avoiding full replacement damage lies, and lies heavily, on a defendant; and the skilled lawyer, or a jury, with the corrective of his direction, will always be able to distinguish between the case where the plaintiff honestly seeks to replace the thing he contracted for and the case—which will always be exceptional—where he wants, not replacement, but to salt the defendant in extortionate damages, and swell his own pocket thereby. In truth and in fact the proof by the defendant may, and, I am inclined to say, to succeed should be, practically conclusive. Such proof—I plead guilty to a repetition—may be in the nature of an admission by the plaintiff; an admission is, of course, the best of all proof; but the facts themselves may furnish proof just as good as an admission; for example, an offer to sell a building for £1,000 immediately before its destruction is conclusive that the plaintiff will be reimbursed for its non-restoration by that sum; and that it is the merest extravagance to say that he should get £5,000 because bricks and mortar were not put up in place of the house valued by him for £1,000.

What is really contended, so far as the head landlord's position is concerned, is that he is entitled to something that is specific performance and yet is not specific performance. What I mean by that is that the applicant's counsel say that he is entitled to a restitutio in integrum (which is specific performance); but neither they nor anybody else are bold enough to say that there should not be a discount of new for old. But still, the argument is, to my mind, substantially for specific performance, or as near it as the case allows. Yet, if one thing is clear, specific performance of a covenant of this kind will never be decreed: *Nunn* v. *Truscott* (1); Fry on Specific Performance, 5th ed., p. 474. The plaintiff has to proceed for damages; when he does so, he is not entitled to get specific performance under the guise of damages, for that is what it comes to, in my opinion.

The authorities on this branch of the case are collected in the judgment of Wright J. in *Joyner* v. *Weeks* (2). There are certain cases which, on their facts, seem difficult to reconcile with the opinion I have expressed; the Lord Chancellor has referred to

(1) 3 De G. & Sm. 304. (2) [1891] 2 Q. B., at p. 37.

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them; but in most, if not all, of these cases, the eminent Judges who decided them shrank from laying down an inflexible rule. But there are also some cases which seem to me, on their facts, absolutely to negative the idea of any inflexible rule, and cannot be reconciled with any principle save that which I have endeavoured to express.

In *Oldershaw* v. *Holt* (1) the defendant took a lease from the plaintiff, one of the terms of which was that the defendant would build houses on the land demised. The defendant not having performed his covenant to build the houses, the plaintiff ejected him, and also brought an action to recover damages for breach of the building covenant. Before this action, the plaintiff secured a new tenant, who took a lease at a considerably greater rent than the rent agreed to be paid by the defendant. Denman C.J. left it to the jury to calculate what damage, if any, the plaintiff had sustained, regard being had to the new and ultimately more advantageous agreement entered into by the plaintiff, and the jury found that no damage had been sustained by the plaintiff. On a new trial motion, the verdict was allowed to stand by Denman C.J., Littledale, Williams and Coleridge JJ.

In *Wigsell* v. *School for Indigent Blind* (2), the grantees of certain land had covenanted with the grantor that the land, except as to the entrance to be made by them towards an intended new road, should be and be kept enclosed on all the sides abutting on the land of the grantor with a brick wall seven feet high. The grantees not having erected a wall in pursuance of the covenant, an action was brought against them by the executors and devisees of the grantor for damages for breach of the covenant. It appeared that, in the events that had happened, the value of the adjoining land of the plaintiffs was not decreased by the non-erection of the wall to anything like the amount which it would have cost to build the wall. It was held (Field and Cave JJ.) that the true measure of the damages being the pecuniary amount of the difference between the position of the plaintiffs upon the breach of contract and what it would have been if the contract had been performed, in the circumstances of the case the amount that it would cost to build the wall was

(1) 12 A. & E. 590.

(2) 8 Q. B. D. 357.

not the correct measure of damages. Field J. remarked: "It was also open to the plaintiffs to do what they have done—viz., bring this action for damages, in which event they will be under no obligation whatever to expend the amount recovered in erecting the wall, and most probably would never think for a moment of any such expenditure, which, to us at least, would seem a simple waste of money. The effect, however, of electing to bring the action for damages is to convert the right to the performance of the contract into a right to have compensation in money, and the rule in such a case, stated in its most general terms, is that the plaintiff is entitled to have his damages assessed at the pecuniary amount of the difference between the state of the plaintiff upon the breach of the contract and what it would have been if the contract had been performed: (per Parke B. in *Robinson* v. *Barman* (1), adopted in *Lock* v. *Furze* (2))."

The facts in *Joyner* v. *Weeks* (3) have been stated by the Lord Chancellor. I am not sure that I do not prefer the judgments of the Queen's Bench Division in that case to those of the Court of Appeal; but in any event the Court of Appeal laid down, as it seems to me, no definite rule on the point under consideration. Esher M.R. expressly refrained from saying that the cost of putting in repair was an absolute rule applicable in all circumstances, though he strongly inclined to think it was so; and Fry L.J. speaks of it as the "ordinary prima facie rule," and takes care expressly to exempt from its operation a destruction caused by vis major or the act of God; for this suggested exception the learned Lord Justice gives no reason. I quite agree that it is a prima facie rule, but what we have to consider is, is it an absolutely inflexible rule, binding on us in this case? I may say, however, with all due deference, I cannot follow the reasoning of that portion of the judgments of the Court of Appeal in which they say that evidence as to contracts as to the demised premises entered into by a landlord suing for breach of a covenant to repair is not admissible on the subject of damages. Such evidence was admitted in *Oldershaw* v. *Holt* (4), to which I have referred. Let me repeat that in measuring damages for the breach of a contract

(1) 1 Ex. 855.
(2) L. R. 1 C. P. 441.
(3) [1891] 2 Q. B. 31.
(4) 12 A. & E. 590.

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to deliver or to deliver in repair we must see what is the value of the thing to the owner of it. What better or more relevant evidence on that can be adduced than evidence as to what use the owner of the thing can make of it in its unrepaired as well as its repaired condition? A man holds premises in a city at a rent of £200 a year, and his lease contains a covenant to keep and yield up in repair. His lease is coming to an end; if nothing happens the premises, they can be re-let by the landlord at the old rent of £200 a year. A theatre manager comes along behind the tenant's back, and enters into an agreement with the landlord for a lease at a rent of £300 a year on condition that the existing premises are to be razed to the ground and a theatre erected on the site. The day before the existing lease expires the premises are accidentally burned down. If the evidence as to the new lease is not to be taken into account, I suppose the tenant would have to spend or pay the cost of rebuilding the premises, which, on the facts I have stated, the landlord had himself agreed should be pulled down. Can our laws of evidence lead to any such absurd result? I think the true view is that in the ascertainment of damages all the circumstances may be taken into account, including the use the plaintiff may make or may agree or have agreed to make of the premises, and including also, as decided by *Conquest* v. *Ebbetts* (1), any obligation he may himself be under to rebuild or repair.

The last case I refer to is *Conquest* v. *Ebbetts* (1), reported in the Court of Appeal and in the House of Lords. In that case the plaintiff sued the defendant, his lessee, for an unexpired term of about four years, for breach of his covenant to keep in repair. The plaintiff himself held the premises, with other premises, under a lease which expired ten days after the expiry of the defendant's lease, and the plaintiff's lease contained a covenant with his landlord to keep and yield up the premises in repair. The plaintiff's action came before an official referee, and the defendant gave evidence to show that at the expiry of the plaintiff's lease the premises would be fit only for building ground, and submitted that the defendant should pay only a small sum (£200) for damages. The plaintiff contended that inasmuch as

(1) [1895] 2 Ch. 377; [1896] A. C. 490.

he was himself under an obligation to yield up in repair, that fact should be taken into account. The official referee accepted the plaintiff's contention, and assessed damages at £1,305; and that decision was affirmed by the Court of Appeal and by the House of Lords. Now, it will be noted that the appeal was an attempt to disturb a finding of fact by a tribunal of fact on what is essentially a question of fact. It will also be noted that the question whether at the end of the plaintiff's own term his landlord would require the premises to be rebuilt, or would use the site as building ground, was, in its nature, very speculative, and especially so as the premises demised to the defendant formed part only of the premises demised to the plaintiff. The actual decision in the case, therefore, seems to me not to conflict with the opinion I have arrived at in the present case. I have carefully read the judgments, and, with the exception of the remarks of Rigby L J. in the Court of Appeal, no inflexible rule seems to me to have been laid down either in the Court of Appeal or in the House of Lords. Lopes L.J., in the Court of Appeal, speaks of "general" rules, not inflexible rules, and then speaks of special circumstances in that case taking it out of the operation of such general rules. Lord Herschell's speech, concurred in by the other members of the House of Lords, is in guarded language: "I do not think that the Court would do right, in assessing the damages in the present case, to involve itself at the instance of the appellants in considerations of that character"; that is, in considerations of the speculation as to what the head landlord would do with the buildings or site at the termination of the plaintiff's lease. But I respectfully suggest that the facts of that case have no resemblance to the facts of the case we have to decide. In Miss Hempenstall's case there is no room for speculation; the premises were nothing save a money-making entity; they produced £20 a year; they were incapable of producing more; £1,400 produces £84 a year. That no man will spend £84 a year to gain a yield of £20 a year is not speculation; it is cold and certain fact.

The only judgment in *Conquest* v. *Ebbetts* (1) that seems to me to help the applicant here is that of Rigby L.J. Speaking

(1) [1895] 2 Ch. 377; [1895] A. C. 490.

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of the assessment of damages in an action for breach of covenant to yield up in repair at the end of the term, he says (p. 385) :— "An arbitrary rule is laid down upon grounds of convenience, that whether or not the lessor in fact loses by the want of repair, he shall be paid the amount which would be necessary to place the premises in good repair. It may happen that a payment of that amount would not induce him to repair; it may be far more to his interest to let the building be pulled down; but these considerations are not taken into account, principally because they depend upon the arrangements which the lessor has made with other persons with which the lessee has nothing at all to do, as to which in general he has no information, and as to which at the time he enters into the bargain he can have none at all." With all due deference, I cannot assent to such a sweeping statement of the law, opposed to some high authority at any rate, notably to *Oldershaw* v. *Holt* (1), to which I have already referred. I cannot accede to the principle that if a landlord has suffered no damage, or little damage, by a breach by his tenant of the tenant's contract, he is entitled to large damages, merely because he is a landlord and his defendant is a tenant; for this places a landlord on a different footing from all other persons with whom contracts of that character are entered into; and there is no foundation in our law, so far as I know, for such a distinction; for the reasons I have stated in the criticism I have endeavoured to make upon *Joyner* v. *Weeks* (2).

I will summarize the conclusions at which I have arrived on the principle of assessment of damages on breach of a covenant to yield up in repair thus: The cost of replacement, allowing a discount of new for old, is the general rule to be applied; it requires very special circumstances to enable the defendant to escape from the operation of that rule; the proof of those special circumstances lies upon him, and must be furnished in a clear and satisfactory manner, and the matter must not be left in the region of mere theory and speculation; but when special circumstances satisfactorily show that the claim for replacement damages is a mere sham, and that what is sought and wished is not replacement at all, but the enrichment of the landlord at the tenant's expense,

(1) 12 A. & E. 590. (2) [1891] 2 Q. B. 31.

the tribunal may refuse to give the cost of replacement, and may award damages upon the basis of giving to the plaintiff the real money equivalent of the loss occasioned to him by the defendant's breach of contract.

We may be sure that Lord Wicklow and Miss Hepenstall will have no difficulty in arranging between them the division of the spoil which results from these proceedings; if Lord Wicklow gets £400 out of the £1,200, he will have £400 in lieu of a rent of £5 12*s.* a year; Miss Hepenstall will have £800 in lieu of her £14 8*s.*; they will, no doubt, be eminently pleased; but I cannot help regretting that they will have benefited so hugely at the expense of the innocent ratepayers of the County of Wicklow, and I have some sympathy with ratepayers all over Ireland who will have to foot bills arrived at on this basis.

For the reasons I have given, I think that the decision of Gibson J. was right, and should be affirmed.

Solicitor for the appellant: *F. Kennedy.*

C. L.

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THE KING *v.* JOSEPH MURPHY (1).

Courts-martial held under the Army Act—Constitution and powers of—Jurisdiction—Review of proceedings of, by King's Bench Division—Erroneous refusal of Court-martial to admit evidence—Defence of the Realm Consolidation Act, 1914 (*5 Geo. 5, c. 8*)—*Army Act*, 1881 (*44 & 45 Vict. c. 58*)—*Rules of Procedure thereunder—Rule* 124 *L—Restoration of Order in Ireland Act*, 1920 (*10 & 11 Geo. 5, c. 31*)—*Regulations*, *13th August*, 1920, 67-84—*Martial Law—Murder—Manslaughter—Trial—Civilian deemed soldier—Cross-examination of witness as to previous statement* (*28 & 29 Vict. c. 18*), *s. 5.*

The authorities referring to the jurisdiction of magistrates apply to general Courts-martial established under the Army Act.

Statutory Courts-martial, like other inferior Courts, are subject to the controlling authority of the King's Bench Division by prohibition, certiorari, or habeas corpus, if they act without or in excess of jurisdiction. But a decision of a Court-martial made intra vires, though erroneous in point of law, does not entitle an accused to such relief.

A Court-martial does not exceed or abuse its jurisdiction merely because it incidentally misconstrues a statute, admits illegal evidence, or rejects legal evidence.

Constitution and powers of statutory Courts-martial discussed.

MOTION ON NOTICE.

Application on behalf of the accused for an order that a writ of habeas corpus should issue to Joseph King, Governor of Cork Male Prison, directing him to bring up the body of the said Joseph Murphy to the Court there to abide and await the judgment of the Court, and for a writ of certiorari directed to the Right Honourable Sir Neville Macready, General Officer Commanding-in-Chief in Ireland and Confirming Authority of the sentences of General Courts-martial in Ireland, and to Major-General Strickland, Competent Military Authority for the City and County of Cork, to bring up the record, findings and adjudications, confirmation, and all other records or documents appertaining thereto of a General Court-martial held on the said Joseph Murphy at Victoria Barracks, Cork, on the 15th December, 1920, in order that they might be quashed upon the grounds that there had been an abuse of the jurisdiction of the Court and a disregard

(1) In the King's Bench Division, before MOLONY C.J., GIBSON, DODD, GORDON, and MOORE JJ.

of the essentials of justice, and the conditions regulating the functions and duty of the Court, inasmuch as counsel for the accused was not allowed to contradict essential witnesses for the prosecution on material and relevant portions of their evidence, by proving that the witnesses in question had made statements on oath at a military inquiry held in lieu of an inquest at variance with their evidence at the trial; and on the grounds that the tribunal had before it a summary of evidence which dealt with and sought to establish charges other than those being investigated by the Court, and on the ground that there was error on the face of the record; and on the ground that the record of proceedings and notes of the evidence and trial established that the trial was not conducted according to the rules of law which should regulate such proceedings, and that a miscarriage of justice had taken place at the trial.

The accused, Joseph Murphy, was tried by a General Court-martial, held at Cork on the 15th December, 1920, and sentenced to death for having been one of an ambush party that fired at a waggon-load of military in the City of Cork on the 8th October, 1920, with the result that a private soldier named Squibbs was killed.

The charge sheet set out the offence as follows:—

CHARGE SHEET.

1st Charge. Murder.

The accused Joseph Murphy, of 5 Thomas Street, Cork, Ireland, civilian, is charged with committing a crime within the meaning of Regulation No. 67 of Restoration of Order in Ireland Regulations, that is to say, murder, in that he, on 8th October, 1920, in the City of Cork, Ireland, feloniously, wilfully, and of his malice aforethought, did kill and murder No. 5487222 Private J. Squibbs, 2nd battalion Hampshire Regiment.

2nd Charge (alternative). Manslaughter.

Committing a crime within the meaning of Regulation No. 67 of the Restoration of Order in Ireland Regulations, that is to say, manslaughter, in that he, on 8th October, 1920, in the City of Cork, Ireland, feloniously did kill and slay No. 5487222 Private J. Squibbs, 2nd battalion Hampshire Regiment.

Signature

Unit with which the accused is in custody } Commanding 2nd battalion Hampshire Regiment. Place, Cork. Date

To be tried by General Court-martial.

Place, Cork.

Date

Major-General,
Commanding 6th Division.

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The President of the Court had also before him at the trial a second charge sheet and summary of evidence in which Joseph Murphy was charged with having a revolver and ammunition in his possession not under effective military control, contrary to certain orders issued by the Competent Military Authority.

Before instituting the present motion, counsel for the accused (M'Elligott K.C.) wrote as follows to the Right Hon. the Attorney-General for Ireland:—

SIR,—I desire to bring before you in your official capacity as His Majesty's responsible legal adviser in Ireland certain facts connected with the trial of Joseph Murphy by General Court-martial at Cork on the 15th December last on a charge of murder on the 8th October, 1920. Briefly, they are that a Military Court of Inquiry was held under the provisions of the Restoration of Order Act, sect. 1, sub-s. 3 f, in lieu of a coroner's inquest. This inquiry was held on either the 6th or 7th October. Two soldiers who gave evidence at the Court of Inquiry, and whose evidence was recorded, were examined for the prosecution at the trial. I appeared as counsel for the accused at the trial, and had in my possession what appeared to be a very full though not verbatim report of the inquiry proceedings. On reading it, it was quite apparent to me that, if the report was at all accurate, the evidence of those two witnesses as given now differed in many material particulars from that they gave before the Court of Inquiry. I called upon the prosecution to produce the original sworn statements of these witnesses before the Court of Inquiry, that I might cross-examine them out of them, and thus test their accuracy and credit. The Judge Advocate ruled that I was not entitled to their production, or to cross-examine out of them, giving as his reason for so ruling, Rule of Procedure 124 L, which, so far as is material, is as follows:—"The proceedings of a Court of Inquiry shall not be admissible in evidence against any officer or soldier, nor shall any evidence respecting the proceedings of the Court be given against any officer or soldier." It seems almost an impertinence to point out to you as a lawyer the absurdity of this ruling. I was not seeking to use the statements against my client. I wanted to use them in his favour. These statements were in the nature of depositions taken by the coroner, and the statute and order are express on this point. Would anyone outside a lunatic asylum rule that I could not cross-examine out of the coroner's depositions? My right to do so is established beyond doubt by the Irish Common Law Procedure Act, 1856, sects. 26 and 27, and these are merely declaratory of the Common Law. The result of this ruling is that evidence of a vital character in favour of my client was excluded; he was found guilty of murder, sentenced to death, and the sentence was confirmed. The evidence was recorded by an official shorthand writer.

On the 18th December I wrote fully on this matter to the G.O. Commanding-in-Chief. I received no acknowledgment of my letter. I wrote

him again to-day, bringing all the facts to his notice, and I told him that I was quite willing to abide by your decision.

I most earnestly appeal to you, sir, in the very best interests of the community, and of the vindication of the law, to intervene to prevent what will be for many years regarded as an outrage on the administration of the law in this country.

This communication should have been made you by my solicitors, but the urgency of the matter is my excuse for appealing to you directly.

I have the honour to be,
Sir,
Your obedient Servant.
E. J. M'ELLIGOTT.

P.S.—I do not deal with the evidence of identification, which to my mind was most unsatisfactory and unconvincing.

E. J. M'E.

Similar letters were sent by counsel to the General Officer Commanding-in-Chief, and to the Judge Advocate-General.

The following facts and matters were set forth in the affidavits filed on the hearing of the motion:—James J. Mooney, of No. 48 South Mall, Cork, Solicitor for the accused, deposed as follows:—

1. I was retained as Solicitor for Joseph Murphy, of 5 Thomas Street, in the City of Cork, who was tried by General Court-martial at Victoria Barracks, Cork, on the 15th day of December, 1920, on alternative charges of (*a*) the murder and (*b*) the manslaughter of Private Squibbs, at Barrack Street, Cork, on the 8th day of October, 1920. I beg to refer to the charge sheets and summary of evidence served on the accused prior to his trial, on which, marked with the letter "A," I have endorsed my name before swearing this affidavit. The said General Court-martial had been convened before the City or County of Cork had been proclaimed as an area in which martial law was in force.

2. On the 8th October, 1920, a Military Court of Inquiry under the provisions of the Restoration of Order in Ireland Act, 1920, sect. 1, sub-s. 3f, was held to inquire into the circumstances of the death of the said Private Squibbs, in lieu of a coroner's inquest. In the ordinary course of proceedings the evidence of the witnesses sworn and examined at the said inquiry was reduced to writing, and the depositions of the said witnesses were signed by them.

3. Lance-Corporal —— and Private ——, who both had made depositions before the said inquiry, were examined as witnesses for the prosecution at the Court-martial trial. Mr. M'Elligott K.C. was instructed by me as counsel for the accused. During the examination of the said lance-corporal it appeared to my counsel and myself that the evidence given by the said lance-

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corporal at the trial differed in many material respects from the evidence given by him at the Court of Inquiry, as it appeared in a newspaper report of the said Court of Inquiry which I had in my possession. When cross-examining the said lance-corporal, counsel called on the prosecution to produce the original record of the proceedings before the Court of Inquiry, in order that he might cross-examine the witness out of his original deposition, for the purpose of testing his credit, accuracy, and veracity. He pointed out that under the above-recited statute, and Regulation 81 made thereunder, the said Court of Inquiry was substituted for a coroner's inquest, and discharged all the functions of a coroner's jury; and that there was no doubt that he would be entitled to cross-examine the witness out of any depositions he had made before a coroner. The Judge Advocate refused to allow the production of the said proceedings on the ground that they could not be used by reason of Army Act Rule of Procedure 124 L, which is as follows as far as same is material: "The proceedings of a Court of Inquiry, or any confession, statement, or answer to a question made or given at a Court of Inquiry, shall not be admissible against any officer or soldier, nor shall any evidence respecting the proceedings be given against any officer or soldier." My counsel pointed out that he did not desire to use the proceedings against his client, but in his favour; but the Judge Advocate persisted in his ruling, with which counsel for the prosecution, a member of the English Bar, expressed his concurrence. It also appeared to my counsel and myself that the evidence of Private ——, given before the Court of Inquiry, as reported in the Press, materially differed from his evidence at the trial; but the same ruling was made in respect to the cross-examination of the said Private ——. The evidence of the said witnesses was given as to the identification of the accused, and was most material, as the defence put forward by the accused was an alibi.

4. At the close of the trial the President of the Court announced that the accused had been found not guilty of manslaughter, and that the finding of the Court in respect of the charge of murder would be promulgated. The finding of the Court in respect of the charge of murder was promulgated on or about the 11th January, 1921, and the accused was found guilty of murder, and sentenced to be executed on the 17th January instant.

5. I am informed by Mr. M'Elligott and believe that on the 18th December he wrote to the Judge Advocate-General and to the confirming authority, the Right Honourable Sir Neville Macready, General Officer Commanding-in-Chief. He further informs me that he kept no copies of the said letters which he sent me on the 18th December, and on which, marked with the letter "B," I have endorsed my name before swearing this affidavit. He further informs me that he received a formal acknowledgment of his letter from the Judge Advocate-General, but that he received no reply from the said Sir Neville Macready. He further informs me that on the 12th January he wrote a letter to the Right Honourable the Attorney-General for Ireland, on a copy of which, marked with the letter "C," I have endorsed my name, and to

which I beg to refer, and a telegram in reply to same, dated the 13th January, 1921, on which, marked with the letter "D," I have endorsed my name before swearing this affidavit, and to which I beg to refer; and also to copy letter, dated 12th January, sent by Mr. M'Elligott to Sir Neville Macready, on which, marked with the letter "E," I have endorsed my name before swearing this affidavit.

6. I respectfully submit that the denial to the accused of the right to cross-examine in respect of the matters set forth in the 3rd paragraph of this affidavit was a denial of the essentials of justice, and was in utter disregard of what must be recognized as the elementary law applicable to the cross-examination of every witness in a civil or criminal case. It is obvious that the exclusion of these statements made by those two essential witnesses was most prejudicial to the case for the accused, and most materially prejudiced his defence. I also respectfully submit that the finding of the accused not guilty of manslaughter is at variance with the finding of guilty of murder, and that this is error on the face of the record for which these proceedings should be quashed. I therefore pray this Honourable Court for a conditional order to bring up the record, findings, and adjudications of the said Court-martial, and for a writ of habeas corpus directed to the Governor of the military prison at Cork and to the Governor of Cork City Prison to bring up the body of the said Joseph Murphy to this Court, to abide and await the judgment of this Court.

7. The said Joseph Murphy is in the custody of Mr. King, the Governor of His Majesty's Male Prison at Cork.

The Right Honourable Sir Cecil Frederick Neville Macready, G.C.M.G., K.C.B., General Headquarters, Irish Command, Parkgate Street, Dublin, General Commanding-in-Chief the Forces in Ireland, deposed as follows:—

1. I am the General Commanding-in-Chief His Majesty's Forces in Ireland, and the facts hereinafter stated are within my own knowledge, save as where herein otherwise it appears.

2. On and prior to the 1st day of July, 1920, and since said date to the present time a state of open rebellion has been and is in existence in, amongst other places, the City and County of Cork, and adjoining districts, such state of rebellion amounting to actual warfare of a guerilla character.

3. In the month of July last, by reason of the then state of affairs, His Majesty's Judges of Assize at the Cork Summer Assizes had to endeavour to discharge their duties and functions under His Majesty's commission in circumstances of great difficulty. Owing to the state of rebellion then existing, it was necessary for them to proceed throughout the country under heavy escort of the armed forces of the Crown, and for their protection it became necessary to have them lodged during the entire Assizes of the City and County of Cork within the precincts of the Court, guarded by such armed

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forces. Large numbers of jurymen, as I am informed and believe, were terrorized and intimidated from attending, and the Judges were unable to dispose of several criminal cases for trial at said Assizes.

4. Most of the police barracks in the area referred to have been destroyed or attacked, and in some cases attacked and injured more than once; many of the police have been killed or wounded in these attacks; ambushes have been prepared by night and day against His Majesty's soldiers and police, and in carrying out these attacks and ambushes the members of the rebel organization have used bombs, rifles, shot guns, and revolvers, and large supplies of petrol for purposes of arson, and numbers of His Majesty's soldiers and police have been attacked, and have sustained many casualties entailing loss of lives and serious injuries. His Majesty's mails have been continually raided, trains have been repeatedly held up, and Government officers have been attacked throughout the country.

5. The aforesaid acts, and many others of a similar nature, have been done by a force known as the Irish Republican Army or Irish Volunteers, who have been continuously engaged in armed rebellion. The said rebel forces are organized as a trained and disciplined military force under a general scheme modelled on the former organization of the British Army, divided up into brigades, battalions, and companies. The Chiefs of the said rebel organization issue military orders, have a general headquarters, and are continuously engaged in levying guerilla warfare against the forces of the Crown. The scheme of the said warfare does not entail fighting in distinctive uniforms, or in accordance with the laws of war, but under a system of guerilla attacks, in which inhabitants, apparently pursuing peaceful avocations, suddenly come together and carry out guerilla operations, which often result in the death of or serious injuries to members of His Majesty's forces and police, at the hands of people who are posing as peaceful civilians. For the information of this Honourable Court, I beg to refer to photographic copies of a few of the orders actually issued by the rebel organization referred to, which I have placed in an envelope, and on which marked "A" I have endorsed my name before swearing this affidavit. From a perusal of these and of many documents of a similar nature in the hands of the Crown, it is clear that a state of rebellion amounting to war of the nature above described is, and has been before and since said 1st day of July, 1920, raging in, amongst others, the districts referred to.

6. Amongst the documents referred to in paragraph 5 hereof, copies of a publication styled "An T'Oglac" have from time to time been found in the possession or under the control of members of the rebel army. In an issue of said publication, which is dated January 31st, 1919, the following, inter alia, is published:—"'Dail Eireann,' in its message to the free nations of the world, declares a 'state of war' to exist between Ireland and England—a fact which has been recognized and acted on by the Volunteers almost from their inception; it further declares that that state of war can never be ended until the English military invader evacuates our country. We have thus a clear

issue laid down, not by anybody who could be termed militarists or extremists, but by the accredited representatives of the Irish people, met in solemn session, in a document drawn up with the utmost care, and a full sense of responsibility, and unanimously adopted. The 'state of war,' which is thus declared to exist renders the national army the most important national service of the moment. It justifies Irish Volunteers in treating the armed forces of the enemy, whether soldiers or policemen, exactly as a national army would treat the members of an invading army. It is necessary that this point should be clearly grasped by volunteers. Every volunteer is entitled, morally and legally, when in the execution of his military duties, to use all legitimate methods of warfare against the soldiers and policemen of the English usurper, and to slay them, if it is necessary to do so, in order to overcome their resistance. He is not only entitled but bound to resist all attempts to disarm him. In this position he has the authority of the nation behind him, now constituted in concrete form. From this day the recruiting, arming, equipping, and drilling of the army of Ireland must be pushed on with even more enthusiasm, earnestness, and speed than before. Every young man in Ireland who by his support of the Republican Army Party has declared his acceptance of the principles which they enunciate, and his allegiance to the Irish Republic, must be made to understand that he thereby pledges himself to fight for these principles, to fight for the Republic. His place is in the ranks of the Irish Volunteers, and those who are already in the ranks must understand that there never was a time when slackness or lukewarmness were less justified—never a time when men could face risks with a clearer conscience or a calmer confidence of ultimate victory."

In an issue of the said publication, purporting to be published on the 1st day of October, 1920, the following, inter alia, is published :—

"Besides being more extensive in the area of activity, the national war is always more unified and concentrated in aim. For the first time Irish national forces are acting in the interests and under the direction of a National Government that is sure of itself, and definite in its aim, unlike the confederation of Kilkenny, that was neither sure of itself nor definite in its aim. A national army acting with singleness of purpose has an enormous advantage over any enemy acting in purely sectional or imperialistic interests.

"Definiteness of aim follows as a result of all this, and our definite aim is the destruction of the invader's power by the destruction of his armed forces and strongholds. This destruction we are achieving bit by bit, and at a steadily increasing rate. To realize this, it is necessary to look back a bit to the beginning of the present year; for example, the numbers of the invaders in Ireland is now greater than it was then—in fact, they are once and a half as great. But their value as a fighting force is very much less. They have lost the initiative; their attempts to recover it have been futile; and

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their morale is lowered to an extraordinary degree. On the other hand, our own forces have gained enormously in value. Our numbers are greater; our organization is more widespread and more uniform; our training is generally greatly advanced; our morale is thoroughly sound. Not only so, but we are still improving; nothing succeeds like success; and we can honestly say that the Irish Republican Army is doing well in all respects; yet there must be no easing up for all that." I refer to copies of said issues of 31st January, 1919, and 1st October, 1920, which I have placed in an envelope marked "B," on which I have written my name prior to swearing this affidavit.

7. In consequence of the condition of the said City and County of Cork, and several other counties, His Majesty's Lord Lieutenant for Ireland, His Excellency Viscount French of Ypres, under the authority and exercising the prerogative of the Crown by a Proclamation dated 10th day of December, 1920* (on a copy whereof marked "C" I have endorsed my name before swearing this affidavit), proclaimed that amongst other counties the County of Cork (East and West Riding) and the County of the City of Cork were and until

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*PROCLAMATION.

Whereas certain evilly disposed persons and associations, with the intent to subvert the supremacy of the Crown in Ireland, have committed divers acts of violence whereby many persons, including members of the forces of the Crown and other servants of His Majesty, have been murdered, and many others have suffered grievous injuries, and much destruction of property has been caused;

And whereas in certain parts of Ireland disaffection and unrest have been especially prevalent, and repeated murderous attacks have been made upon members of His Majesty's forces, culminating in the ambush, massacre, and mutilation with axes of sixteen Cadets of the Auxiliary Division, all of whom had served in the late war, by a large body of men who were wearing trench helmets, and were disguised in the uniform of British soldiers, and who are still at large:

Now I, John Denton Pinkstone, Viscount French, Lord Lieutenant-General and General Governor of Ireland, do hereby proclaim, by virtue of all the powers me thereunto enabling, that the following counties, namely: the County of Cork (East Riding and West Riding); the County of the City of Cork; the County of Tipperary (North Riding); the County of Tipperary (South Riding); the County of Kerry; the County of Limerick; the County of the City of Limerick—are, and until further order shall continue to be, under and subject to martial law.

And I do hereby call on all loyal and well-affected subjects of the Crown to aid in upholding and maintaining the peace of this realm and the supremacy and authority of the Crown, and to obey and conform to all orders and regulations of the military authority issued by virtue of this proclamation.

Given at His Majesty's Castle of Dublin this 10th day of December, 1920.

FRENCH.

GOD SAVE THE KING.

further Order should continue to be under and subject to Martial Law; and I (the deponent) published my proclamation dated the 12th December, 1920* (on a true copy of which marked "D" I have endorsed my name before swearing this affidavit), and to which I beg to refer.

8. Subsequent to the said proclamations, namely, on the 13th day of December, 1920, the Court-martial for the trial of the said Joseph Murphy, applicant in this case, was convened by order of the General Officer Commanding the 6th Division, who is also the Military Governor for the said Cork area, and a competent Military Authority for said area within the meaning of the Restoration of Order in Ireland Regulations made under the Restoration of Order in Ireland Act.

9. I say that I am informed and believe that since the 1st day of July, 1920, in the said Cork area six military officers have been murdered, thirteen wounded, and that five are missing, and of other ranks twenty-one have been murdered, sixty-nine wounded, and one is missing. During the same period and in the same area I am informed and believe that of His Majesty's police forces thirty-five have been murdered and fifty wounded; and I charge that all these casualties have been brought about by the actions of the rebels above referred to.

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* PROCLAMATION No. 1.

BY THE GENERAL OFFICER COMMANDING-IN-CHIEF, THE FORCES IN IRELAND.

Martial Law has been declared in the Counties of Cork, Tipperary, Kerry, and Limerick.

Irishmen! understand this: Great Britain has no quarrel with Irishmen; her sole quarrel is with crime, outrage, and disorder; her sole object in declaring Martial Law is to restore peace to a distracted and unhappy country; her sole enemies are those who have countenanced, inspired, and participated in rebellion, murder, and outrage. It is to put an end, once and for all, to this campaign of crime that Martial Law has been declared.

The Authorities named in the First Schedule hereto annexed are hereby appointed Military Governors for the administration of Martial Law in the above counties, and all persons will render obedience to their orders in all matters whatsoever.

Note this:

(*a*) All arms, ammunition, and explosives in possession of any person not a member of His Majesty's Naval, Military, Air, or Police Forces, or who is not in possession of a permit, will be surrendered by the 27th December, 1920, to such persons and at such places as are named in the Second Schedule hereto annexed.

(*b*) After the 27th December, 1920, any unauthorized person found in possession of arms, ammunition, or explosives will be liable, on conviction by a Military Court, to suffer death.

(*c*) Any unauthorized person wearing the uniform or equipment of His Majesty's Naval, Military, Air, or Police Forces, or wearing similar clothing

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Mr. James J. Mooney, in the course of an affidavit in reply, said :—

1. The information supplied to General Sir Neville Macready with regard to His Majesty's Judges during the last Summer Assizes at Cork is inaccurate. The Judges during the said Assizes stayed at their usual lodgings at Tivoli, in the suburbs of Cork, about one and a half miles from the Courthouse.

2. I have no personal knowledge of the various matters detailed in the said affidavit regarding the disturbed condition of the districts in said affidavit mentioned, the greater portion of which is deposed to on information and belief, without stating the source of the information; but I do say there is no such condition of affairs in either the County or the City of Cork as could be in any way described as a rebellion.

* * * * * * * * *

4. I was afforded an opportunity, through the courtesy of the Chief Crown Solicitor, of having a hurried inspection on the 22nd instant of the record of the proceedings herein. The inspection was necessarily a hurried one by reason of the fact that a copy of the affidavit of General Sir Neville Macready did not reach my hands until that morning (Saturday). It was, I believe, delivered late at the office of my town agents on the previous evening.

5. With reference to the proclamations referred to in said affidavit, I respectfully submit, as is evident from the record of the proceedings in this case, that they are altogether irrelevant on the questions for determination in the application before this Honourable Court. From my recollection of the

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likely to deceive, will be liable on conviction to suffer death, and any person in unauthorized possession of such uniform, clothing, or equipment will be liable on conviction by a Military Court to suffer penal servitude.

(*d*) Note well:

That a state of armed insurrection exists, that any person taking part therein or harbouring any person who has taken part therein, or procuring, inviting, aiding or abetting any person to take part therein, is guilty of levying war against His Majesty the King, and is liable on conviction by a Military Court to suffer death.

(*e*) All Law Courts, Corporations, Councils, and Boards are hereby directed to continue to carry out their functions until otherwise ordered.

(*f*) The Forces of the Crown in Ireland are hereby declared to be on active service.

Signed this 12th day of December, 1920.

C. F. N. MACREADY, General,
Commanding-in-Chief, the Forces in Ireland.

FIRST SCHEDULE. — The Generals or other Officers Commanding 6th Division, 16th, 17th, 18th, and Kerry Infantry Brigades.

SECOND SCHEDULE.—To a Military or Police Officer at any Military or Police Barracks, or to a Priest or other Minister of Religion who will at once arrange for their delivery to the nearest Military or Police Barracks.

trial and my inspection of the said record thereof, I say that there was no suggestion at any time during the trial of the prisoner that the trial was under martial law, and I beg to refer to the documents attached to the proceedings. There is no document on the file of the proceedings referring the case for trial to the Competent Milltary Authority under Regulation 67 (2), made in pursuance of the Restoration of Order (Ireland) Act; and I submit, in addition to the other grounds already set forth in my previous affidavits, that this is also error on the face of the record.

6. I beg to refer, when same is produced, to the determination of the Competent Military Authority, marked "L," signed by the President of the Court-martial, which is attached to and forms part of the record, and attached to the proceedings at the trial, from which it appears that the order determining that the trial of the prisoner herein should be by Court-martial was dated the 1st of December, 1920, before either of the proclamations already referred to. I also beg to refer to the notice convening the said Court-martial when produced, but I say that I received portion of the summary of evidence against the prisoner before the 10th day of December, 1920, and the remainder (with the exception of one or two unimportant witnesses' evidence) on the 11th day of December, 1920.

7. I say that prior to and at the date of the trial of the prisoner herein the ordinary Courts of His Majesty in Ireland were sitting and available for the trial of both civil and criminal cases, and that there was nothing to prevent depositions being taken in the ordinary way or to prevent the trial of the said prisoner being held in one or other of the said Courts in any part of Ireland to which the Attorney-General or the King's Bench Division should assign it for trial.

Lynch K.C., *M'Elligott K.C.* (with them *H. J. Moloney*), for the accused.

The Right Hon. the Attorney-General (*Denis S. Henry K.C.*, *M.P.*) (with him *Best K.C.* and *Lipsett*).

Lynch K.C. (having stated the nature of the application, read the notice of motion, the affidavits filed for the hearing and exhibits referred to therein):—There are, I submit, three propositions of law—1, the Court-martial in this case derived its authority solely from statute; 2, it was bound to record and did record the evidence given before it, and the evidence is part of the record (counsel read the Rules of Procedure published in pursuance of the Army Act (Nos. 95 A and B)); 3, this Court has jurisdiction to examine the record, and will quash the proceedings if the Court-martial acted without or in excess of jurisdiction.

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Cases dealing with the exercise of jurisdiction as regards the Court-martial of members of the military or naval forces, or in regard to military discipline, do not apply. As regards these cases, the general principle is that, in the case of a soldier charged before a Court-martial, once it appears that he is in custody under an order, good on its face, the Court will not interfere on habeas corpus alone. The order good on its face is a sufficient return to the writ. The distinction is drawn very clearly by the Court in *In re Mansergh* (1) between the civil rights of a soldier and his military status. In that case Lord Kenyon C.J. said: "We are not now sitting as a Court of error to review the regularity of their proceedings, nor are we to hunt after possible objections. I have said this, admitting pro hac vice that we may examine into this question on a return to a habeas corpus; but that is an arduous question, on which, if it were necessary, I should wish to take much more consideration." That runs on rather fine lines, because if the order on the face of it fell short in any way of showing that the Court had jurisdiction to deal with the case on habeas corpus, a soldier would be discharged: *In the Matter of Capt. Douglas* (2) and *Porrett's Case* (3).

The present case is the trial of a man under the Restoration of Order in Ireland Act, 1920, and the regulations made under that Act. The trial did not purport to be had under the Martial Law Proclamation. But if it is contended that it was so, we are prepared to argue the effect of that.

Molony C.J.: Does not the charge purport to be under the Restoration of Order Act? *Lynch K.C.*: That is so. Now, sect. 1, sub-s. 2, of the Restoration of Order in Ireland Act provides that the provisions of the Defence of the Realm Consolidation Act, 1914, with respect to the trial by Courts-martial or Courts of Summary Jurisdiction and punishment of persons committing offences against the Defence of the Realm Regulations shall extend to the trial of persons who have committed crimes in Ireland, including persons committed for trial, or against whom indictments have been found, so, however, that any crime when so tried shall be punishable with the punishment

(1) 2 B. & S. 400. (2) 2 Q. B. 825.

(3) Perry's Oriental Cases, p. 414.

assigned to the crime by statute or common law, and a Court-martial when trying a person charged with a crime punishable by death shall include as a member of the Court a person certified to be a person of legal knowledge and experience. Regulation 67 of the Restoration of Order in Ireland Regulations defines the expression "crime," and Regulation 68, 5, provides that "if it is determined that the case is to be proceeded with, and that the crime is not a crime punishable on summary conviction, or is not of such a character as aforesaid . . . the competent naval or military authority may direct that the case shall be tried by Court-martial, and where such a direction is given the case shall be tried by Court-martial, and not otherwise, unless the direction is withdrawn"; and Regulation 68, 6, "any person who is in custody in respect of any crime, the investigation of which has been referred to the competent naval or military authority, may be detained either in civil custody or in military custody," &c.

The case must be referred to the military authorities by some civil authority. In this case we have not seen the record, and we now ask for the order referring the case to the military authorities.

[*The Attorney-General*: There is no such order.] *Lynch K.C.*: There must be some civil authority who decides that the case is to be referred to the military authorities.

[Molony C.J.: If such an order were in existence, you would be entitled to it. *Lynch K.C.*: It is an essential part of the record (Rules of Procedure under the Army Act, 1881, No. 95, A); and if there is any vital defect in the record, I am entitled to the benefit of it.]

Now, as regards the matters dealt with in the affidavits, Regulation 81 provides that the Lord Lieutenant may (C) provide for the duties of a coroner and a coroner's jury as respects any inquest prohibited by the order being performed by a Court of Inquiry constituted under the Army Act instead of by a coroner and jury. That regulation is made under sect. 1, sub-s. 3 f, of the Restoration of Order in Ireland Act, 1920 (counsel read the sub-section). What is the effect of these provisions? They do not say that the Court is to proceed in any way differently from a coroner's inquest as regards procedure.

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Instead of before a coroner and a jury, the inquest is to be held by a Court of Inquiry under the Army Act; and the rule dealing with Courts of Inquiry under the Army Act is Rule 124 of the Rules of Procedure, and Rule 124, sub-rule L, provides that "the proceedings of a Court of Inquiry, or any confession, statement, or answer to a question made or given at a Court of Inquiry, shall not be admissible in evidence against any officer or soldier, nor shall any evidence respecting the proceedings of the Court be given against any officer or soldier, except upon the trial of any officer or soldier under sect. 29 of the Army Act, for wilfully giving false evidence before that Court." That rule is made in pursuance of sect. 70, sub-s. 1, of the Army Act, which also provides that the rules made in pursuance of that section shall be judicially noticed. In this case counsel for the accused at the Court-martial asked a witness a question about his evidence, and called for the statement he made at the previous inquiry. The Judge Advocate ruled against counsel. That ruling, I submit, was wrong; and the decisions in the books with regard to the law regulating the jurisdiction of magistrates, where it is incumbent on the Justices to record evidence, apply equally to Court-martial proceedings.

The evidence can be inquired into to see if the Justices acted in excess of jurisdiction; and in cases of Courts-martial officers have been held liable to actions for damages.

Courts of summary jurisdiction and Courts-martial are both statutory Courts; and those who act as Judges must keep within the four corners of the statute. Once they go outside the statute their orders become valueless.

Refusing to furnish the statement of evidence to counsel for the accused, to enable him to cross-examine the witness, deprived the accused of the opportunity of defending himself, and this amounted to a disregard of one of the essentials of justice, and the proceedings should accordingly be quashed: *Cahill* v. *Dublin JJ.* (1).

[Gibson J.: Lord Halsbury has held (*R.* v. *Marsham*) (2) that a magistrate has jurisdiction to go wrong in applying the laws of evidence, but he has no jurisdiction to refuse to hear the

(1) [1920] 2 I. R. 230. (2) [1892] 1 Q. B. 375.

defence, or to allow the defendant to examine witnesses. Is not the question before us not whether the record is wrong on its face, but whether wrongfully excluding cross-examination is the same thing as refusing to admit evidence? You say that preventing cross-examination is preventing evidence, and that is depriving the accused of his means of proof.] *Lynch K.C.*: That is so.

[Moore J.: Do you say there is any difference between shutting out legal evidence and admitting illegal evidence: are they on the same plane?] *Lynch K.C.*: I would rather rest this case on the exclusion of legal evidence.

[Gibson J.: I ask the Attorney-General is there any objection to treating the case as one involving prohibition? *The Attorney-General*: I prefer to deal with the case as it stands.

Gibson J.: It is a matter of life or death. *The Attorney-General*: Certiorari will give my friend all he requires.]

Lynch K.C.: The most recent case on the general jurisdiction of the Court is the *Daily Mail Case* (1). I submit that in the present case the Judge-Advocate misguided the Court, and gave Rule 124 (L) a meaning which it does not bear.

[Molony C.J.: Do you go further and say that if it had that meaning it would be ultra vires?] *Lynch K.C.*: I do. The only power given to make these rules is under sect. 70 of the Army Act.

I should like to refer to a passage in Simmons on Courts-martial, 5th ed., at page 282: "The power of the Superior Courts to inquire into the conduct of the president and members, or any individual member, of a Court-martial against whom there may be alleged an undue exercise of authority, any excess of jurisdiction, or any illegality of proceeding, has been evinced by their proceedings in several instances."

The first case to which I would refer the Court is that of *Grant* v. *Gould* (2), where Lord Loughborough says, in reference to Courts-martial: "This Court, being established in this country by positive law, the proceedings of it and the relation in which it will stand to the Courts of Westminster Hall, must depend upon the same rules, with all other Courts which are instituted and have particular powers given to them, and whose acts, therefore, may become the

(1) 37 T. L. R. 310.

(2) 2 Henry Blackstone, 101.

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subject of application to the Courts of Westminster Hall for a prohibition. Naval Courts-martial, Military Courts-martial, Courts of Admiralty, Courts of Prize, are all liable to the controlling authority which the Courts of Westminster Hall have from time to time exercised, for the purpose of preventing them from exceeding the jurisdiction given to them, the general ground of prohibition being an excess of jurisdiction when they assume a power to act in matters not within their cognizance."

[Molony C.J.: There are two cases mentioned in the argument of Serjeant Marshall in that case in support of the motion for a prohibition which ought to be looked at: *Bredon* v. *Gill* (1) and *Shotter* v. *Friend* (2).

Gordon J.: There is a passage in Lord Loughborough's judgment which points out that the foundation of prohibition must be that the inferior Court is acting without jurisdiction. The passage continues: "It cannot be a foundation for a prohibition that in the exercise of their jurisdiction the Court has acted erroneously. That may be a matter of appeal, where there is an appeal, or a matter of review. Though the sentence of a Court-martial is not subject to review, there are instances, no doubt, where, upon application to the Crown, there have been orders to review the proceedings of Courts-martial."] *Lynch K.C.*: If I bring myself within *Cahill's Case* (3), this Court has jurisdiction.

[Gibson J.: I think you will have to find the limits of interference within *R.* (*Martin*) v. *Mahony* (4).] *Lynch K.C.*: I will deal with *R.* (*Martin*) v. *Mahony* (4).

In *Muspratt's Case* (5), which was one concerned with a person subject to military discipline, the Court proceeded according to the practice of Courts-martial, and the only remedy was to appeal to His Majesty. This is a case of a civilian handed over. He is deemed to be a soldier during the trial, but the trial is to be in accordance with the Army Act, and the accused is entitled to come to the King's Bench and to say that the ordinary rules of justice have been disregarded.

(1) 2 Salk. 555; 5 Mod. 271; 1 Ld. Raym. 212.
(2) 3 Mod. 283.
(3) [1920] 2 I. R. 230.
(4) [1910] 2 I. R. 695.
(5) MacArthur on Courts-martial, 4th ed., vol. ii, p. 158; Simmons on Courts-martial, 5th ed., sect. 919, p. 344.

[Moore J.: They were asked to construe a regulation. They did their best; it is not a case of refusal.]

Lynch K.C.: On the question of the liability of officers of Courts-martial to be sued in damages for exceeding jurisdiction, I might refer the Court to *Fry* v. *Ogle* (1). In *Mahony's Case* (2) the question was, as Lord O'Brien states at the commencement of his judgment, whether the proper remedy was certiorari, remedy by case stated, and also by way of appeal to Quarter Sessions, being open to the prosecutor. In this case we have no remedy but the one we are seeking. Later on in his judgment Lord O'Brien, having discussed Lord Denman's proposition at page 706 of the report, continues: "I do not refer to cases of a different character . . . nor to cases where, the evidence being set out or incorporated, there may be error on the face of the conviction or order." And again at page 708: "It is one of the essential requirements of justice that a charge should be duly formulated, that an accused person should have due notice of it, and that he should be given an adequate opportunity of defending himself. Such matters are not mere formalities; they are the essential requirements of justice." In this case counsel was prevented from making his defence, and the case comes within the passages I have quoted. Again, in the same case Mr. Justice Gibson, at page 731, says: "Certiorari lies . . . (C) where there has been abuse of jurisdiction, as by mis-stating the complaint, etc., or disregard of the essentials of justice and the conditions regulating the functions and duty of the tribunal." And again, on the same point, Cockburn C.J., in *Reg.* v. *Russell* (3), at page 117 of the report, says in cases of summary jurisdiction the Court will not interfere "unless in course of the inquiry something has taken place inconsistent with natural justice, or rather, as I prefer to call it, rational justice, or something has been omitted, without which justice could not be administered, e.g., the hearing of witnesses. The same rule must be applied to the stronger case of the decision of a Court of record." [Counsel also referred to *Rex* v. *Eaton* (4) and *Comyn* v. *Sabine* (5),

(1) MacArthur on Courts-martial, 4th ed., vol. i, p. 268.
(2) [1910] 2 I. R. 695.
(3) 10 B & S. 91.
(4) 2 T. R. 285.
(5) Unreported.

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cited in *Mostyn* v. *Fabrigas*, Smith's Leading Cases, vol. i, p. 671, and *R.* (*Redmond*) v. *Jellett* (1).]

[At this stage the Court, after consultation, intimated that they would make an order respiting execution until Wednesday week, and the Attorney-General said he would communicate it to the military authorities.]

There are one or two other matters for the consideration of the Court. 1. The summary of evidence and charge sheet contained a charge against the accused of having a revolver in his possession. That summary of evidence and charge sheet were before the President of the Court-martial. I submit that that was irregular, and to the prejudice of the prisoner. Again, 2, the accused was charged (*a*) for murder and (*b*) for manslaughter. He was acquitted on the manslaughter charge and convicted for murder. I submit the findings were at variance. The conviction does not become operative until confirmed; the acquittal was operative the moment it was pronounced. There was no duty cast on the Court to announce their decision on one charge. They might have referred the whole matter to the confirming authority (Rule of Procedure 49).

A very important question, and a far-reaching one in its results, has been raised by the affidavit put in by the Crown. The meaning of it is this: it is quite true, what you allege as to the conduct of the Court-martial did occur; we do not question your right to certiorari, but you cannot get the order, because, 1, there was a proclamation of martial law on the 10th December; and, 2, there was a further proclamation on the 12th December. By reason of these the jurisdiction of the Court is ousted. It is difficult to imagine where a claim on the part of the Crown like that leads to. One of the proclamations, as a matter of fact, provides for penalties unauthorized by any Act of Parliament, and of a severity unknown to the criminal law. Even where there is rebellion, it is not the law that rebels are not to be handed over to the ordinary Courts, if the ordinary Courts are available. If a rebel is made prisoner, no proclamation can take him out of the hands of the civil Courts. On this point I might refer the Court to Blackstone's Commentaries, vol. i, p. 419:

(1) [1919] 2 I. R. 79.

"For martial law, which is built upon no settled principles, but is entirely arbitrary in its decisions, is, as Sir Matthew Hale observes, in truth and reality no law, but something indulged rather than allowed as a law. The necessity of order and discipline in an army is the only thing which can give it countenance, and therefore it ought not to be permitted in time of peace, when the King's Courts are open for all persons to receive justice according to the laws of the land." [Counsel also referred to Coke's Institutes, vol. iii, p. 52; Stephen's History of Criminal Law, vol. i, p. 207; *Wright* v. *Fitzgerald* (1).]

[Molony C.J.: You adopt the Summary of Sir James Stephen at p. 215? As regards No. 3 of that Summary, is it not qualified by the three South African cases, which held that the mere fact of the Civil Courts being sitting is not conclusive, because the war or rebellion might be raging at the same time? I suppose you say those cases do not apply?] *Mr. Lynch K.C.*: Yes; because the accused was tried under a statute, and the statute is not martial law, but the law of the land.

[Dodd J.: But the statute makes every man a soldier.

Molony C.J.: Yes; but he still has his civil rights.

The Attorney-General: I prefer to reserve my observations until I come to reply. My proposition is that once you get into the martial law area this Court cannot inquire into the matter.]

Lynch K.C.: In Dicey's Law of the Constitution, at p. 289 of the last edition, you will find the following passage:—"Now, this kind of martial law is in England utterly unknown to the Constitution. Soldiers may suppress a riot, as they may resist an invasion; they may fight rebels, just as they may fight foreign enemies; but they have no right under the law to inflict punishment for riot or rebellion"; and there is a very interesting charge to the Grand Jury by Cockburn C.J., at the Central Criminal Court, in the case of *R.* v. *Nelson and Brand* (2). [Counsel read extracts from the charge, and also referred to *Rainsford* v. *Browne* (3).] We do not admit that the state of things in Cork is as represented by the Crown; but, even if it was, this man could have been tried in an adjoining county, on the certificate of the

(1) 27 St. Trials, 715. (2) Frederick Cockburn's Report of the Charge. (1867.)
(3) 2 N. Ir. Jur. Repts. 179.

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Attorney-General, before the ordinary Courts of the land; depositions could have been taken, and he could have been sent for trial. The accused had been in custody from the 22nd October. The proclamations are dated the 10th and 12th December, and it is suggested that the accused is deprived of his rights by reason of events which occurred subsequently to his arrest.

[Molony C.J.: He was tried under statute.] *Lynch K.C.*: The Crown have dropped that. They do not now say that he was tried under the Restoration of Order Act. What they now say is "martial law, and this Court has no jurisdiction."

As a further point in favour of the accused, counsel submitted that the accused could only be sentenced to death by a two-third majority of the Court, and that this fact should have appeared on the record.

On the question of the civil authority referring the case to the military, I would like to add that the word "refer" in legal matters has a well-known signification. In arbitration proceedings, it means there must be a regular submission, and in making his award every arbitrator has to show on the face of his award the regularity of that submission. Counsel referred to Wharton's Law Lexicon and cases on arbitration.

To return to the case of *R.* (*Martin*) v. *Mahony* (1), it turned in the first instance, if not altogether, on—1, whether the magistrate had jurisdiction to hear the case before him; and 2, whether he had jurisdiction to make the order he made—in other words, whether the forms were strictly complied with. From time to time, by various means, attempts were made to take away the jurisdiction of the King's Bench Division to review decisions of magistrates' courts. It was first provided that their decisions should be final. The King's Bench Division was not stopped by that. It was then provided, in certain cases, that certiorari should not apply. That also failed. The third way was effective by providing that a particular form of conviction should be used, and if the form was strictly complied with, the Court could not go behind it, and that is why the order in *Mahony's Case* (1) excluded the jurisdiction of the Court. In this case, the record is defective, and the Court is not prevented

(1) [1910] 2 I. R. 695.

from inquiring into it. When a person appeals to the discretion of the High Court to exercise its jurisdiction, the fact that there is no other remedy is a matter that operates on the mind of the Court: *R.* v. *Moreley* (1); *Overseers of Walsall* v. *London North-Western Railway Co.* (2); *R.* v. *Berkley and another* (3). [On the question of cross-examination, counsel referred to Denman's Act, 28 & 29 Vict., c. 18, sect. 1, Archbold's Criminal Pleadings, at p. 492.]

[Dodd J.: The sentence of the Court-martial was confirmed, and before you attack the Court-martial you must attack the decision of the confirming officer.

The Attorney-General: The record is kept to submit to the confirming officer. He referred to Rule of Procedure, No. 56 (*a*) and (*b*).

Molony C.J.: That must be read in connexion with the King's Regulations. Every person convicted by a Court-martial has an ultimate appeal to the King.

The Attorney-General: It is a review within the meaning of Lord Erskine's argument in *Rex* v. *Suddis* (4).]

Lynch K.C.: This case was adjourned on Monday last for the purpose of putting in an affidavit presumably to correct statements of facts in the affidavit on which the application was grounded. But not a single statement in the affidavit grounding the application has been dealt with in the affidavit put in to oppose the application. There was only one meaning to the latter affidavit—viz., that in this case it appeared on the face of the record that there was an absence of jurisdiction on the part of the Court-martial to investigate this matter, and they had fallen back on the proclamation of martial law. They knew that under the Restoration of Order Act their proceedings were wrong and the record defective.

The Attorney-General, opposing the application, said: The concluding remarks of my friend strike me as rather strange. An affidavit cannot cure jurisdiction. I propose to deal first with the question of the existence of martial law in this

(1) 2 Burr. 1041.
(2) 4 App. Cas., at p. 39.
(3) [1754] 1 Kenyon Kepts., at pp. 92 and 102.
(4) 1 East, 306.

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particular area, and to deal afterwards with the other questions so ably raised by my learned friend.

It is quite true that the crime had been committed antecedently to the proclamation of martial law, and that the Court-martial had been convened antecedently to the proclamation of martial law. The proclamation of martial law has really nothing to do with it. The proclamation merely gave notice, and the question really is: Is there a state of rebellion existing or not? If so, the Courts deal with it on the basis of martial law. On this point I would refer the Court to Forsyth's Constitutional Law, at p. 198. The joint opinion of the Attorney-General and Solicitor-General, Sir John Campbell and Sir R. M. Rolfe, as to the power of the Governor of Canada to proclaim martial law is there set out [counsel read the opinion], so that the test really is the condition of affairs. The position under martial law has been considered in a number of cases arising in the Colonies; but it is a strange thing that there is no record even after Sedgmoor of martial law having been declared in England. There were Commissions, of course, but they never took the form of martial law.

[Dodd J.: Did not the King send them down by virtue of the prerogative? *The Attorney-General*: Even so, they never took the form of martial law proclamations.] At p. 212 of Forsyth reference is made to the charge to the Grand Jury in *R.* v. *Eyre* (1) in 1867 by Lord Chief Justice Cockburn, in which he said: "So far as I have been able to discover, no such thing as martial law has ever been put in force in this country against civilians for the purpose of putting down rebellion"; and the note continues: "But martial law has been several times proclaimed in Ireland. It was proclaimed there in 1798 by the Lord Lieutenant; and the proclamation was signed by the Lord Chancellor, the Lord Chief Justice, and the Law Officers of the Crown." The Act of Indemnity, 37 Geo. 3, c. 11 (Ir.), speaks of "the use and salutary exercise of His Majesty's undoubted prerogative in executing martial law"; and a similar recital appears in 43 Geo. 3, c. 117. The same declaratory statement of the "undoubted prerogative" is repeated in 3 & 4 Wm. 4, c. 4 (1833).

(1) Finlason's Report (1868).

It appears to be clear from the authorities that, while actual warfare or rebellion is raging, acts done by the military authorities are not justiciable by the ordinary tribunals. Counsel referred to *Elphinstone* v. *Bedreechund* (1); *Attorney-General for the Cape of Good Hope* v. *Van Reenen* (2); *Tilonko* v. *The Attorney-General of the Colony of Natal* (3); and *Ex parte D. F. Marais* (4). The last-named case was argued by Lord Haldane when at the Bar for the petitioner, and he referred to the opinions I have mentioned, and his great contention was that when the civil Courts were open the offender could not be tried by a military Court. He also relied on *Eyre's Case* (5), but he did not refer to *Wolfe Tone's Case* (6), and it is quite impossible that he should have overlooked it.

[Gibson J.: *Wolfe Tone's Case* (6) was founded on the fact that he was not a British soldier.] *The Attorney-General*: In *Marais's Case* (4) there was a petition to the Privy Council for leave to appeal against the decision of the Superior Court of Cape Colony, and the petition was refused, the Court holding that, where actual war is raging, acts done by the military authorities are not justiciable by the ordinary tribunals. In this case the area is the important thing, and, once you found the tainted area, the principles to which I have referred apply. They had only to look for the area, and when they had done that, the words of Lord Halsbury applied: the matter "is not justiciable by the ordinary tribunals."

[Molony C. J.: Do you say that every Court assembled in a martial law area is a martial law Court?] *The Attorney-General*: No, I say it is consistent with the Commander-in-Chief adopting a Court that may not be strictly a martial law Court, and putting it there as a martial law Court.

[Molony C.J.: Is not the simple answer that he did not do it?] *The Attorney-General*: I do not know.

[Molony C.J.: Does not every document show that it was a Court under the Restoration of Order Act?] *The Attorney-*

(1) Knapp's Privy Council Reports, p. 316.
(2) [1904] A. C. 114.
(3) [1907] A. C. 93 and 461.
(4) [1902] A. C. 109.
(5) Finlason's Report (1868).
(6) 27 State Trials, 613.

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General: Is there any evidence that he took from the military officers the powers to deal under martial law with anybody?

[Molony C.J.: There is no evidence that he gave it to them.

Dodd J.: You are arguing as if the Restoration of Order Act did not exist. You say that we have no power while a rebellion existed. But after the rebellion is over, do you say that we have no power to intervene in a case of sentence of death?] *The Attorney-General*: No one suggests that the rebellion is over here.

[Dodd J.: You say we have no power to stay your hands?]

The Attorney-General: Yes. Supposing that there was no question that this was martial law, pure and simple, your Lordships on the authorites could not interfere. The moment that the rebellion was over every one of these men could be sued, and the only thing is an Act of Indemnity. Many such have been passed.

[Dodd J.: Is not martial law, so far, overruled by the Restoration of Order Act, and has not the accused to be tried by a particular tribunal, appointed with particular precautions?]

The Attorney-General: No; in that particular respect the Restoration of Order Act contains no language that interferes. Assuming that this Court was sitting in a non-Conrt-martial law area, then the question arises as to the other argument so clearly put forward by my learned friend, Mr. Lynch. It comes to this: a Court of Inquiry substituted for the Coroner's Court was held. Two witnesses only were examined before that Court, and the examination before that Court was called for by Mr. M'Elligott. He did not take the step of getting a certified copy, as he was entitled to under the statute. [*Lynch K.C.*: He is not entitled to it.]

The Attorney-General: And it was not produced. There is nothing to show that it was in the custody of the Court; and, indeed, the rules of procedure do not provide for its being transmitted to the persons who constitute the Court. Suppose the coroner's depositions were not in the High Court, suppose there was no certified copy in the hands of the prisoner, would any Judge allow that cross-examination to take place?

[Gibson J.: Whether the document was there or not, I understand that the Court-martial would not allow a question to be founded on it.]

The Attorney-General: They allowed cross-examination on the newspaper report which was there. [*Mr. Lynch*: No.]

[Gibson J.: I understand that if the document was there and handed to prisoner's counsel, they would not have been allowed to cross-examine.

The Attorney-General: I think, in all fairness, that is so.

Molony C.J.: Certainly, the affidavit implies that it was there, because the Judge Advocate refused to allow its production.]

The Attorney-General: Under our Judicature Rules there is a provision that even in the case of a new trial, if there was an improper admission or rejection of evidence, that would not necessarily be a ground for a new trial. They had to go a great deal further, and find as to its materiality.

[Gibson J.: That does not apply to the Crown side.] *The Attorney-General*: I quite admit that.

[Dodd J.: If this case came before the Court of Crown Cases Reserved, or was a case stated by a Judge of Assize, would the order stand?] *The Attorney-General*: I do not think so.

[Gibson J.: Cannot the Commander-in-Chief allow a Court to act under the Restoration of Order Act, or could he not set up a Military Court under the Army Act?] *The Attorney-General*: Then it becomes his Court.

On the question of the prerogative of the King to proclaim martial law, counsel referred to 39 Geo. 3, c. 11(Ir.), sect. vi, and to 3 & 4 Wm. 4, c. 4, sects. 13 et seq. The Court referred to 41 Geo. 3, c. 14, and the Lord Chief Justice to a passage in Sir James Stephen's History of Criminal Law: "It is impossible to suppose that such declarations as these should operate as a repeal of the Petition of Right as regarded Ireland, though the language of the two Acts appears to be conflicting."

The Attorney-General: That must be read in connexion with Lord Halsbury's judgment in *Marais's Case* (1), in which he takes the point as regards the Petition of Right.

Counsel then submitted that the judgments in *R.* (*Martin*) v. *Mahony* (2) were not as Mr. Lynch contended, but the other way. There was no refusal to hear alibi witnesses. An honest mistake within jurisdiction does not vitiate the result, and an erroneous

(1) [1902] A. C. 109. (2) [1910] 2 I. R. 695.

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ruling in point of evidence cannot be relied on as disregarding the essentials of justice. There is no case that goes to that extent.

As regards the point that two-thirds must concur in the sentence of death, I would be prepared to argue, if necessary, that that only applies where there are alternative sentences open, and does not apply where the sentence of death is the only sentence. [Refers to R. 44 (*f*).] The Court here came to the conclusion that this was not a manslaughter case, but a murder case, and dealt with it as such. In the Civil Courts the point has been considered by the Court for Crown Cases Reserved in *R.* v. *Bankes* (1).

On the point as to referring the matter to the military authorities, the prisoner might be tried by Court-martial "where such a direction was given." It was given in this case on the 1st December, 1920. That direction is exhibited. I submit that the order must stand.

Best K.C.: I do not propose to add anything to the argument of the Attorney-General.

M'Elligott K.C., in reply.

Cur. adv. vult.

MOLONY C.J. delivered the unanimous judgment of the Court:—

This application comes before us on a motion, which the Court permitted to be brought, grounded on affidavits stating that the prisoner's counsel was deprived, by an erroneous ruling of the Court-martial, of the right of cross-examining two witnesses for the prosecution, as to evidence given by them at a previous Court of inquiry, which erroneous decision was alleged to constitute excess or abuse of jurisdiction, within the competence of this Court to review.

The Attorney-General, when the motion was called on, was ready to proceed on the uncontradicted materials then before us, but claimed that, if necessary, he should be allowed at a later stage to put in affidavits, the exact nature of which he did not then indicate. The Court decided that the case should be disposed

(1) [1911] 2 K. B. 1095.

of as a whole, and not piecemeal or in sections. The motion was accordingly adjourned, and an affidavit was made by General Sir Neville Macready, the Commander-in-Chief of His Majesty's Forces in Ireland, alleging a state of open rebellion to exist in the City and County of Cork, and relying on a proclamation of His Excellency the Lord Lieutenant, dated 10th December, declaring the said City and County to be under and subject to martial law. The Attorney-General contended that, as the Court-martial was held in an area in which martial law had been proclaimed, it was not competent for this Court to interfere. As, however, all the proceedings were conducted on the basis that the Court-martial was held under statutory authority, and as our judgment is adverse to the prisoner on that assumption, it becomes unnecessary to consider the broad question of the effect and application of martial law, as to which our opinion would be in the nature of an obiter dictum.

Our judgment is confined to the jurisdiction of this Court to review the proceedings of a Court-martial held under the Army Act, 1881, the Restoration of Order in Ireland Act, 1920, and the Regulations made by His Majesty in Council. The Court, in view of the gravity of the case, has allowed the arguments to extend to certiorari, habeas corpus, and prohibition—the only known methods of correction and review. If under any of these writs Joseph Murphy is entitled to challenge the decision of the Court and sentence, he is entitled to do so irrespective of the form of the notice of motion which has brought the case before us for determination, the affidavits on behalf of the prisoner being uncontradicted.

It was not questioned that a statutory Court-martial, however extensive its capacity and power, was an inferior Court, subject to our limited right of control, and the Attorney-General did not attempt to support the ruling impeached. Whether, if the document had been produced and cross-examination permitted, it would have affected the result is a matter on which we decline to speculate; we must assume that prejudice to the prisoner may have resulted from the denial of the right of cross-examination.

We will first inquire into the constitution and powers of the

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Court-martial and the provisions of the Army Act, the Restoration of Order in Ireland Act, and the Rules and Regulations applicable thereto. We will then examine the question of evidence raised on behalf of the accused; and we will finally consider whether the case comes within the authorities justifying the intervention of the Court.

By the Defence of the Realm Consolidation Act, 1914 (5 Geo. 5, c. 8), power was given to His Majesty in Council to issue regulations for securing the public safety and the defence of the realm; and it was, amongst other things, provided that for the purpose of the trial of a person for an offence under the regulations by Court-martial, and the punishment thereof, the person may be proceeded against and dealt with as if he were a person subject to military law, and had on active service committed an offence under sect. 5 of the Army Act.

By sect. 5 of the Army Act every person subject to military law who, on active service, commits any of the offences therein specified shall, on conviction by Court-martial, be liable to suffer penal servitude, or such less punishment as is in the Act mentioned.

By the Restoration of Order in Ireland Act, 1920 (10 & 11 Geo. 5, c. 31), power was given to His Majesty in Council to issue regulations under the Defence of the Realm Consolidation Act, 1914, for securing the restoration and maintenance of order in Ireland; and it was further provided by sect. 1, sub-s. 2, that the provisions of the principal Act with respect to the trials by Court-martial or Courts of Summary Jurisdiction, and punishment of persons committing offences against the Defence of the Realm Regulations, should extend to the trial of persons alleged to have committed, and the punishment on conviction of persons who have committed, crimes in Ireland, whether before or after the passing of the Act, including persons committed for trial, or against whom indictments have been found; and sect. 1, sub-s. 6, further provides that the expression "crime" shall mean any treason, treason felony, felony, misdemeanour, or other offence punishable, whether on indictment or on summary conviction, by imprisonment, or by any greater punishment, other than offences against the Defence of the Realm Regulations.

In pursuance of the powers given by this Act, regulations were made by His Majesty in Council on the 13th August, 1920, and all the regulations now in force in regard to the restoration of order in Ireland are embodied in the Restoration of Order in Ireland Regulations which have been published by the Government.

The regulations which deal with the punishment of crime are Nos. 67 to 84, inclusive, and they provide (inter alia) that a person may be tried for a crime by a General Court-martial, a Field General Court-martial, or a District Court-martial, and that when a person is found guilty he shall be liable to the punishment assigned to the crime by statute or by common law, and that, when the sentence is one of death, the sentence shall be carried out at such time and place and by such person as the confirming authority may order, and the order signed by the confirming authority shall be sufficient warrant for the carrying out of the sentence.

In the present case Joseph Murphy, a civilian, was tried by a General Court-martial at the Victoria Barracks, Cork, on the 15th December, 1920, on the charge of having committed a crime within the meaning of Regulation No. 67 of the Restoration of Order in Ireland Regulations, that is to say, murder, in that he, on the 8th October, 1920, in the City of Cork, Ireland, feloniously, wilfully, and of his malice aforethought, did murder No. 5,487,222, Private J. Squibbs, 2nd Batt. Hampshire Regt., and alternatively, on the charge of having committed another crime within the meaning of the said regulation, that is to say, manslaughter. At the close of the trial, the Court announced that the prisoner was found not guilty of manslaughter, but a conviction for the murder of Squibbs was duly promulgated against him, after confirmation.

There is no question in the case as to the Court having been properly constituted, or that it was competent to pass the sentence, or that the sentence was fully confirmed, but a writ of certiorari is sought upon the ground that there had been an abuse of the jurisdiction of the Court and a disregard of the essentials of justice and the conditions regulating the functions and duty of the Court, inasmuch as counsel for the accused was not allowed to

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contradict essential witnesses for the prosecution on material and relevant portions of their evidence, by proving that the witnesses in question had made statements on oath at a military inquiry held in lieu of an inquest, at variance with their evidence at the trial; and on the further ground that the tribunal had before it a summary of evidence which dealt with and sought to establish charges other than those being investigated by the Court.

It appears that under the powers given by sect. 1, sub-s. 3 (*f*), of the Restoration of Order in Ireland Act, and regulation 81, 1, made in pursuance thereof, the Lord Lieutenant made an order prohibiting the holding of an inquest, and providing for the duties of a coroner and a coroner's jury being performed by a Court of inquiry constituted under the Army Act, instead of by a coroner and jury; regulation 81, 2, further provided that such Court of inquiry should have and might exercise all or any of the powers which might have been exercised by the coroner or coroner's jury for the purpose of the inquest and the finding thereof, whether conferred by statute or at common law.

By sect. 70 of the Army Act, power is given to make rules of procedure for (inter alia) the assembly and procedure of Courts of inquiry, and accordingly Rules of Procedure 124 and 125 provide for the holding of such inquiries. Rule 124 (L) is as follows:—"The proceedings of a Court of inquiry, or any confession, statement, or answer to a question made or given at a Court of inquiry, shall not be admissible in evidence against any officer or soldier, nor shall any evidence respecting the proceedings of the Court be given against any officer or soldier, except upon the trial of any officer or soldier under sect. 29 of the Army Act for wilfully giving false evidence before that Court."

124 (M) further provides that an officer or soldier who is tried by Court-martial in respect of any matter or thing which has been reported on by a Court of inquiry, and, unless the Army Council see reason to order otherwise, an officer or soldier whose character is, in the opinion of the Army Council, affected by anything in the evidence before or in the report of a Court of inquiry, shall be entitled to a copy of the proceedings of the Court, including any report made by the Court, on payment of the actual cost

of the copy required, not exceeding 2*d.* per folio of seventy-two words.

At the Court of inquiry held to investigate the death of Private Squibbs, a lance-corporal and a private gave evidence, and they were again examined at the Court-martial for the trial of the accused, and gave evidence connecting him with the commission of the crime. It appears from the affidavit of the accused's solicitor that when counsel was cross-examining the lance-corporal, he called on the prosecution to produce the original record of the proceedings before the Court of inquiry, in order that he might cross-examine the witness out of his original deposition, for the purpose of testing his credit, accuracy, and veracity. It appeared to him that the evidence which was then being given by the lance-corporal differed in many material respects from the evidence given by him at the Court of inquiry, as it appeared in a newspaper report of that inquiry which counsel had in his possession. The Judge Advocate refused to allow the production of the proceedings, on the ground that they could not be used by reason of Rule of Procedure 124 (L).

It seems to us to be clear that 124 (L) had no bearing on the matter at all. When an officer or soldier has been examined before a Court of inquiry, the effect of the rule is that his statement is not admissible in evidence in any proceedings against the officer or soldier, unless the proceedings are brought under sect. 29, charging him with having given false evidence at the inquiry. If the ruling of the Judge Advocate was correct, there would be no object at all in the following regulation, 124 (M), which entitled the accused to obtain a copy of the proceedings of the Court of inquiry on payment of the actual costs of the copy required. The object for which the production of the proceedings before the Court of inquiry was required was to enable counsel to show that the evidence then given by the lance-corporal was at variance with a previous statement in writing made by the witness, on the question of identification; and this was a matter of vital importance, on which counsel was entitled to rely.

Section 128 of the Army Act provides that the rules of evidence to be adopted in proceedings before Courts-martial shall

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be the same as those which are followed in civil Courts in England; and no person shall be required to answer any question or to produce any document which he could not be required to answer or produce in similar proceedings before a civil Court. There is no doubt that a party in a civil Court would be entitled to call for the production of the depositions taken at a coroner's inquest; and as regards depositions taken before a magistrate, regulation 59, sub-s. 4, provides in express terms that where the case of a person committed for trial for a crime is referred to the competent naval or military authority, the depositions and any statutory statement of the accused attached thereto shall be delivered to the competent naval or military authority, and shall be deemed to be a summary of evidence duly taken under the Army Act and the rules of procedure thereunder, and shall be admissible in evidence on the trial by Court-martial in like circumstances and manner in which they would be admissible in evidence on a trial by a civil Court with a jury.

It is to be noted that under sect. 190, sub-s. 31, of the Army Act the expression "civil Court" means with respect to any crime or offence a Court of ordinary criminal jurisdiction, and includes a Court of summary jurisdiction.

A deposition before a coroner or a magistrate or any other statement can be put in evidence under the provisions of 28 & 29 Vict. c. 18, s. 5, which provides that a witness may be cross-examined as to a previous statement made by him in writing, or reduced into writing, relative to the subject-matter of the indictment or proceeding, without such statement being shown to him; but if it is intended to contradict such witness by the writing, his attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting him.

The evidence being clearly admissible under sect. 5 of 28 & 29 Vict. c. 18, if it is objected that regulation 124 (L) provides to the contrary, the answer is two-fold: 1, that on its true construction 124 (L) has no such meaning; and 2, that if it had, the rule would be ultra vires and void, because the rules are made under the authority of sect. 70 of the Army Act; and sub-s. 2 of sect. 70 provides expressly that no such rules shall contain any-

thing contrary to or inconsistent with the provisions of the Act, and the construction sought to be put by the Judge Advocate on 124 (L) would be clearly inconsistent with the rules of evidence, to which effect is to be given by sect. 128.

We are, therefore, of opinion that the Judge Advocate was wrong in the opinion which he gave the Court; and, indeed, the Attorney-General in his argument did not attempt to support it.

The Court, however, can scarcely be blamed for following the advice of the Judge Advocate, because 103 (*f*) of the rules of procedure provides that "upon any point of law or procedure which arises upon the trial which he attends, the Court shall be guided by his opinion, and not overrule it, except for very weighty reasons. The Court are responsible for the legality of their decisions, and they must consider the grave consequences which may result from their disregard of the advice of the Judge Advocate on any legal "point."

The Court, then, having come to a wrong conclusion on the admissibility of the evidence, which may have affected the result, it next becomes necessary to consider the question as to whether, in consequence of such decision, the proceedings are open to review by this Court.

There is no doubt that this Court has always exercised over Courts-martial, and over other Courts of limited jurisdiction, a power to prevent them acting without or in excess of jurisdiction. As Lord Loughborough said in *Grant* v. *Gould* (1), in reference to the Court-martial proceedings which he was then considering: "This Court being established in this country by positive law, the proceedings of it, and the relation in which it will stand to the Courts of Westminster Hall, must depend upon the same rules, with all other Courts which are instituted, and have particular powers given them, and whose acts, therefore, may become the subject of application to the Courts of Westminster Hall for a prohibition. Naval Courts-martial, military Courts-martial, Courts of Admiralty, Courts of Prize all are liable to the controlling authority which the Courts of Westminster Hall have from time to time exercised, for the purpose of preventing them from exceeding the jurisdiction given to them, the general ground

(1) 2 Hy. Blackstone, 69.

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of prohibition being an excess of jurisdiction, when they assume a power to act in matters not within their cognizance."

If a Court-martial acts without or in excess of jurisdiction, this Court can exercise its controlling authority against the tribunal by writs of prohibition or certiorari, and against the governor of the prison, or whoever improperly detains a person, by means of a writ of habeas corpus.

Of the three remedies—certiorari, habeas corpus, and prohibition—the most suitable, probably, would be, not certiorari, for the reasons given in *Smart* v. *Wolfe* (1) and *Reg.* v. *Riall* (2), but rather habeas corpus or prohibition, as upon a return to a writ of habeas corpus, as in *In re Douglas* (3), or upon a declaration in prohibition, as in *Grant* v. *Gould* (4), the decision would be open to review. The law as to the control exercised by the King's Bench over inferior Courts has been conclusively settled by *Rex* (*Martin*) v. *Mahony* (5) applied in *Rex* (*Redmond*) v. *Jellett* (6) and *Rex* (*Ryan and another*) v. *Starkie and another* (7). The case of *Rex* (*Cahill*) v. *Justices County Dublin* (8), relied on by Mr. Lynch, is an illustration of a conviction being quashed where it was made in disregard of all judicial rules. The effect of my judgment is not, however, quite correctly stated in the head-note, as it depended mainly on the fact that while the prosecutor based an entirely new case on an alleged admission by the defendant, the Justices refused to permit the defendant to meet the new case or explain. Having been deprived of an opportunity of explanation or defence, the Court thought it was a manifest abuse of jurisdiction.

The authorities referring to the jurisdiction of magistrates, always the subject of jealous supervision by the Superior Courts, apply to a General Court-martial established under the Army Act, which exhibits many of the features of a Superior Court, the decision of which requires confirmation and may be the subject of an ultimate appeal to the King or his representative, under sect. 57 of the Army Act and paragraph 591 of the

(1) 3 Term Repts. 323, at p. 340.
(2) 11 I. C. L. R. 279.
(3) 3 Q. B. 825.
(4) 2 Hy. Blackstone, 69.
(5) [1910] 2 I. R. 695.
(6) [1919] 2 I. R. 79.
(7) 54 I. L. T. R. 15.
(8) [1920] 2 I. R. 230.

King's Regulations, to quash the proceedings, or to mitigate, remit, or commute the punishment.

Mr. Lynch has contended that the Court-martial had not jurisdiction because it was not shown that the case had been referred to the Competent Military Authority under Regulation 68 (2). The reference, however, need not be in writing or in any particular form; and the determination of the Competent Military Authority in writing, dated 1st December, 1920, necessarily implies that the case had been duly referred to him, and enabled the Court-martial to be duly and regularly convened. Mr. Lynch further contended that as under Rule 95 of the Rules of Procedure a record was to be kept of the transactions of the Court, the evidence was thereby made part of the record, and was examinable by this Court. Mr. Lynch's argument is, however, directly contrary to the decision of this Court in *Rex (Ryan and another)* v. *Starkie* (1), which decided that the Court could not look at the evidence in a case before a Court of summary jurisdiction under the Criminal Law and Procedure (Ireland) Act, 1887, although by sect. 11, sub-s. 4, of that Act the evidence was to be taken as depositions in the same manner as if the offence were an indictable offence. The object of requiring a note of the evidence to be taken at a Court-martial is not to make such evidence part of the record, but to assist the Court, accused, and the confirming authority, and, in the last resort, the King or his representative. Mr. Lynch also objected that the tribunal had before it a summary of evidence which dealt with other charges than those being investigated by the Court; but it appears from Mr. Mooney's affidavit that all the President of the Court-martial had was what he was entitled to, and in fact bound to, have under Rule 17 (E) of the Rules of Procedure. Mr. Lynch's further objection to the charge sheet containing alternative charges of murder and manslaughter has no substance, because such alternative charges are expressly authorized by the Rules of Procedure (see Rule 44 (*f*), 55 (*a*), and First Appendix). Mr. Lynch also suggested that he could rely on autrefois acquit, because the accused was acquitted on the charge of manslaughter at the trial, while the conviction on the charge of murder was not confirmed or promulgated for some time

(1) 54 I. L. T. R. 15.

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afterwards. The course adopted, however, was in strict accordance with sect. 53, sub-s. 4, of the Army Act, and was regular in every respect.

Even admitting that the evidence cannot be looked at for the purpose of seeing if there was evidence to sustain the verdict, Mr. Lynch further contends that there had been an abuse of the jurisdiction of the Court and a disregard of the essentials of justice in refusing to allow the witnesses to be contradicted by the production of statements made by them at the Court of inquiry. The Court-martial must, however, in the exercise of its jurisdiction, decide questions, not only of fact, but of law, including the admissibility of evidence: *Reg.* v. *Marsham* (1). When the Court has jurisdiction to decide a matter, its jurisdiction is not ousted because it happens to give an erroneous decision, and it certainly cannot be deemed to exceed or abuse its jurisdiction merely because it incidentally misconstrues a statute, or admits illegal evidence, or rejects legal evidence. The authorities establishing this are fully discussed in *Mahony's Case* (2), to which may be added *Ex parte Lewis* (3); *In re Dunford* (4); *Ex parte Rayner* (5); *Robinson* v. *Lenaghan* (6); and *Reg.* v. *The County Court Judge of Greenwich* (7). Ecclesiastical Courts and Admiralty Courts occupy a special position, with which we are not now concerned.

Up to the present no text-writer on Court-martial law has suggested that this Court could set aside the decision of a Court-martial on account of an incidental mistake in applying the law of evidence. All the cases relative to Courts-martial which have engaged the attention of the Court have been cases where there was an excess of jurisdiction proper. If the present application is to be granted, it would involve that every statutory Court-martial would be subject to review in the same way as if its conclusion was before the Court on an ordinary new trial motion in a civil case, with the disadvantage that Order 39, rule 7, of our Judicature rules would not apply. However desirable it might be to be able to invoke the authority of this Court in dealing with

(1) [1892] 1 Q. B. 371.
(2) [1910] 2 I. R. 695.
(3) 21 Q. B. D. 191.
(4) 12 Jurist, 361.
(5) 17 L. J. C. P. 16.
(6) 17 L. J. Ex. 174.
(7) 37 W. R. 132.

cases of such gravity as that before us, in the period of over two centuries that Courts-martial have existed, there has been no instance of any such exercise of jurisdiction. We have carefully considered all the reported decisions upon this branch of law: *Grant* v. *Gould* (1); *Rex* v. *Lord Mount Norris* (2); *Wolfe Tone's Case* (3); *Rex* v. *Suddis* (4); *Blake's Case* (5); *Re Poe* (6); *Re Douglas* (7); *Re Mansergh* (8); *Re Flint* (9); and *Ferguson's Case* (10); and none of them gives any support to the contention now advanced that a mistake as to evidence is fatal to jurisdiction.

The only example as to a mistake in disallowing evidence is found in Mr. Erskine's argument in *Rex* v. *Suddis* (4), where he refers to the *Case of the ship "Bounty"* (11), in which he had taken a personal interest. The facts of the case are stated in MacArthur on Courts-martial, 4th ed., vol. ii, p. 158; and also in Simmons on Courts-martial, 5th ed., sect. 919, p. 344. In that case Muspratt and nine others were tried together by Court-martial under a charge of mutiny on the 28th April, 1789, on board H.M.S. "Bounty," commanded by Captain Bligh. At the close of the case there was no evidence against two of the accused, and Muspratt, who could not be himself examined, asked that they should be acquitted, in order to allow him to have the benefit of their evidence in his favour, as was the custom in the ordinary criminal courts. The Court-martial, acting on a supposed rule of practice, refused the application, thinking, apparently, that the guilt or innocence of all the accused should be disposed of at one and the same time. In consequence of the feeling excited the matter was brought before the Law Officers. (See their opinions, MacArthur, vol. ii, App., p. 376.) The Attorney-General (afterwards Lord Chief Baron MacDonald) and the Solicitor-General (afterwards Lord Eldon) declared their opinions separately; they concurred that it was the custom of criminal Courts in such cases for the Judge in his discretion to direct the acquittal of an innocent

(1) 2 Hy. Blackstone, 69.
(2) Ir. Term Repts. 460.
(3) 27 State Trials, 613.
(4) 1 East, 306.
(5) 2 M. & S. 428.
(6) 5 B. & Ad. 681.
(7) 3 Q. B. D. 925.
(8) 1 B. & S. 400.
(9) 15 Q. B. D. 488.
(10) [1917] 1 K. B. 175.
(11) MacArthur on Courts-martial, 4th ed., vol. ii, p. 158; Simmons on Courts-martial, 5th ed., sect. 919, p. 344.

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person to enable him to give testimony, and they inclined to the opinion that Muspratt was entitled to the same benefit in the case in question, and they suggested the propriety of submitting the case to the Judges. The twelve Judges were consulted in an advisory capacity, and, in consequence of their unanimous opinion that the conviction was unwarranted, the man was set at liberty.

It appears from a letter of Lord Erskine, as he had then become, prefixed to James's Collection of Sentences on Court-martial (see Simmons on Courts-martial, Section 919, page 346), that he was of opinion that the mistake was one which could not have been set right by an appeal to any of the Courts of Justice, though the disallowance of witnesses where the person could not be himself examined was much more serious than the refusal to allow the cross-examination in the present case. The relief was given, not by law, but by the Crown. From the legal point of view, this solitary instance as to the effect of disallowance of testimony is adverse to the arguments of the prisoner's counsel, as the only evidence for Muspratt was excluded, whereas in the present case cross-examination upon evidence previously given by witnesses was alone disallowed. All we have to deal with is the misapplication of the laws of evidence, not refusal to hear the defence, which might, as is suggested by the authorities in *Mahony's Case* (1), and *Cox* v. *The Lord Mayor of London* (2), support prohibition—a question which does at present require decision. In one respect *Muspratt's Case* (3) might help the prisoner, as it certainly suggests the propriety, where the Judges express an opinion adverse to the conduct of the trial, to defer execution of sentence in order to afford an opportunity of bringing the new situation caused by such an opinion before the supreme authority.

After a careful examination of the principles and authorities governing the case, we are of opinion that, although the Court-martial gave an erroneous decision in point of law, it was a decision made intra vires, and does not entitle the accused to the relief sought in the present application.

(1) [1910] 2 I. R., at p. 742.
(2) L. R. 2 H. L., at p. 276.
(3) MacArthur on Courts-martial, 4th ed., vol. ii, p. 158; Simmons on Courts-martial, 5th ed., sect. 919, p. 344.

We desire, however, to add that while, in consequence of our decision, we have no power to give any further stay of execution, we think that the prisoner should have an opportunity of making any application he may desire in accordance with the provisions of the Army Act and the King's Regulations, and that a reasonable time should be allowed to him for that purpose.

Solicitors for the accused : *Babington, Clarke, & Mooney.*
Solicitor for the Crown : *The Chief Crown Solicitor.*

H. J. M'C.

[The following announcement has been published in the press:—"Having before him conclusive evidence of the guilt of Joseph Murphy, and in view solely of the repeated postponements of his execution and of the distress of mind which has been caused to him thereby, as an act of mercy the General Officer Commanding-in-Chief has commuted the sentence to one of penal servitude for life."—ED.]

Appeal.
1921.

Feb. 7.

MURPHY *v.* THE COUNTY COUNCIL OF WEXFORD (1).

Malicious injury—Damage to buildings—Owner in fee in possession—Measure of compensation.

The measure of compensation for the malicious destruction of or injury to a building in the possession of a claimant as owner in fee is not necessarily the cost of the restoration or reinstatement of the building. The Court should award full compensation in moneys numbered for the injury or loss sustained by the owner, due regard being had to all the circumstances of the case, including the potential value, as well as the existing value, to the owner of the property destroyed or injured.

Case Stated at Wexford Summer Assizes, 1920, for the determination of the Court of Appeal by the Right Honourable Mr. Justice Gibson as follows:—

1. This appeal was by the applicant in respect of the malicious destruction of a police barrack at Ballybrazil, County Wexford, and was based on alleged insufficiency of the amount, £420, awarded by order of the County Court Judge, dated 17th June, 1920.

Mr. Mooney appeared for the appellant. The County Council were not represented.

2. The facts were as follows:—The barrack, which had been vacated on the 14th November, 1919, was burned on the 13th May, 1920. It is situated six miles from New Ross, and was included in the appellant's holding of seventy-three acres, held by him at a purchase annuity of £35 9*s.* 8*d.*, payable to the Irish Land Commission, the date being 26th October, 1898. The barrack was let on 7th February, 1880, to Colonel Hillier, the then Inspector-General. The tenancy is still in being, the reversion being vested in the applicant. The expenditure necessary to

(1) In the Court of Appeal, before Sir James Campbell C., and Ronan and O'Connor L.JJ.

reconstruct the premises was estimated at £1,415 10*s.* I found as a fact that £1,200 would be the proper amount to be allowed if the compensation was to be assessed on the principle that the cost of rebuilding was the determining element.

3. Appellant's counsel contended that the compensation should be assessed on the basis of such cost. I was of opinion that the rent paid for the barrack, £22 per annum, represented its full permanent letting value, for which no increase could be reasonably expected, and that, if the barrack was intact and uninjured, its saleable value, even if held in fee, considering the character and situation of the building, would not exceed the sum awarded. If £1,200 was allowed on the footing of rebuilding, the applicant would be a large gainer by the fire.

I had an appeal of similar type before me at Wicklow Summer Assizes (*Hepenstall* v. *Wicklow County Council*) (1), in which I have stated a case setting forth fully therein the reasons of my conclusions, to which I refer. There were two other appeals at the Wexford Assizes, involving the same question, in which Patrick Byrne was appellant appearing, by the same counsel; and I have deferred my decision until the Court of Appeal should have determined the question on which counsel said that previous Assize decisions had been given in accordance with his views. At his request I state this case.

4. The order under appeal, the instrument under which applicant holds, and the letting to the police authority, dated 7th February, 1880, are incorporated with and are to be read as part of this case. The question for the decision of the Court of Appeal is as follows:—Was the applicant entitled to have his compensation assessed on the basis that it was determined by the cost of rebuilding, irrespective of what the value of the premises was if the same had remained uninjured? If the question is answered affirmatively, the sum of £1,200 is to be substituted for £420 awarded by the order under appeal, with £13 10*s.* costs and £6 expenses. If answered negatively, the order is to be affirmed, without costs of appeal.

(1) [1921] 2 I. R. 165.

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S. L. Brown K.C. and *Gibson K.C.* (with them *Mooney*), contended that the proper measure of compensation was the cost of restoring the buildings which had been destroyed.

[The following cases were cited and discussed:—*Noblett* v. *Leitrim County Council* (1); *Worthington* v. *Tipperary County Council* (2); *Hepenstall* v. *Wicklow County Council* (3); *Livingstone* v. *Rawyards Coal Company* (4); *Newcastle* (*Duke of*) v. *Hundred of Broxtowe* (5); *Wednesbury Corporation* v. *The Lodge Holes Colliery Company, Ltd.* (6).]

There was no appearance for the County Council.

SIR JAMES CAMPBELL C.:—

The applicant in this case is the owner in fee of a farm of land upon which there had been erected a suitable dwelling-house. Not requiring this house for his own accommodation or for use or occupation in connexion with the farm, he let it over twenty years ago to the Crown for the purpose of a police barrack under a yearly tenancy, subject to an annual rent of £22, and to determination by a three months' notice on either side. This tenancy continued until recently, when the house was maliciously burned to the ground, and the question for decision in these circumstances is as to the proper measure of compensation. In *Hepenstall* v. *Co. Council of Wicklow* (3) one aspect of this question had to be considered in this Court in circumstances essentially different, as Mr. Brown, in his concise and clear argument, has frankly admitted, from those in the present case. There the applicant had let the house as a police barrack under a yearly tenancy upon the terms that she should keep the premises in repair; but her own title was that of lessee under a lease which at the date of the malicious destruction of the building had in fact expired, so that she was holding under an implied tenancy from year to year subject to the terms of the expired lease, one of which was that she was to keep and deliver up the premises in good repair. It was held by the majority in this Court that,

(1) [1920] 2 I. R. 143.
(2) [1920] 2 I. R. 233.
(3) [1921] 2 I. R. 165.
(4) 5 A. C. 25.
(5) 4 B. & Ad. 273.
(6) [1907] 1 K. B. 78.

inasmuch as pursuant to this covenant she was liable to her own lessor for the cost of restoration, nothing short of this cost would or could adequately compensate her for the injury sustained, and that in all cases of this kind depending upon the lessee's unqualified covenant to deliver up in repair, the Court was not at liberty to enter into considerations or speculations founded upon the unsuitability of the premises for the lessor's purposes, even though it was proved that the vacant site would be more valuable to him than had the buildings remained intact upon it. Nor in such a case has the Court any right, as pointed out by Wright J., in giving the judgment of the Court in *Joyner* v. *Weeks* (1), to take into account that as the result of public benevolence, insurance, or a change in market values, the loss to the lessor has been nullified or recouped. In *Joyner* v. *Weeks* (1) the facts were remarkable, because the lessor in that case had executed a new lease to a third person, in anticipation of the expiration of the other, by which he obtained not only an increased rent, but also a covenant to expend £200 on the premises and to keep them in repair; and as the amount of his claim against the first lessee was only £70, he would have made a substantial gain even though he received nothing by way of damages for the breach by his lessee of the covenant to keep and deliver up the premises in good repair; nevertheless it was held by the Court of Appeal, affirming the judgment of Wright J., that it must be taken as a settled rule of law that, apart from all such considerations, the damages to be recovered in such a case were to be measured by the cost of restoration. The same principle was affirmed by the House of Lords in *Conquest* v. *Ebbetts* (2), upon facts almost identical with those in *Hepenstall's Case* (3), and consequently my colleague and I felt coerced to apply it. These cases depend entirely upon the consequences and obligations of the lessee's covenant, and in no way control a case like the present, in which the precise question arises for the first time in this Court as to the true measure of compensation for the malicious injury where the claimant is for all practical purposes the owner in fee in possession. I entirely adopt the contention of the applicant's counsel that the principle

(1) [1891] 2 Q. B. 31. (2) [1896] A. C. 490.
(3) [1921] 2 I. R. 165.

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to be applied in such a case is that of restitution, or restitutio in integrum, as it is called, but I cannot agree that this principle is necessarily or even generally only consistent with restoration or reinstatement. It means, as is said in Halsbury's Laws of England, vol. x, paragraph 559, p. 302, upon the authority of many decisions, that the law will endeavour, so far as money can do it, to place the injured person in the same position as if the contract had been performed, or before the occurrence of the tort; but it goes on to say that "the principle of restitutio in integrum is largely theoretical, being the ideal or standard at which the law is supposed to aim, but which in practice is rarely attained." Indeed, it is obvious that this is so. Take, for example, the case of a Gainsborough picture, a rare jewel, or a racehorse which is favourite for the Derby. They are lost or destroyed by the act or negligence of a third party in circumstances affecting him with liability, but no money award will enable them to be restored to or replaced by the owner, though it will, so far as money can do it, absolve him from pecuniary loss.

Or take the case of trespass by the wrongful diversion of minerals, to which the owner is entitled, as happened in *Livingstone* v. *Rawyards Coal Co.* (1). In such a case replacement or restoration is plainly out of the question; and in the particular instance it was held by the House of Lords that, as the owner was not himself in a position to work the mineral and convert it into profit, his damages were properly measured by the royalty he would have received had he allowed another person to work and use it. Again, a plaintiff loses an eye or a limb as the result of the negligence of a railway or other company whose passenger he is. He cannot have either restored or replaced, and his damages can only be measured by money, such a sum as will recompense him for his suffering and for the handicap in the competition of life resulting from the maiming of which he has been the victim. As regards trespass to houses or lands, I have failed to find any case, unless it be *Duke of Newcastle* v. *Hundred of Broxtowe* (2), in which the damages were measured by the cost of restoration or by any principle other than the consequent diminution in the money value of his property to the owner,

(1) L. R. 5 A. C. 25.

(2) 4 B. & Ad. 273.

save and except in cases in which the element of punitive or exemplary damages was present, which I will deal with hereafter; but even in such cases the remedy is found, not in the application of the principle of restoration, but by aggravated damages. At the same time, I wish to guard myself from saying that there may not be instances, of which I can conceive several, such as buildings with an historical value or family associations, churches, chapels, long-established business premises in important thoroughfares or commercial centres—in fact, premises which from special circumstances have a peculiar value to the owner, in which the compensation for their destruction in whole or in part would be less than adequate if it did not equal the cost of restoration. I can also understand the existence of minor considerations which should properly be considered in ascertaining the compensation, as, for example, if the applicant in the present case had satisfied the Court, whose duty it is in fixing the amount to see that the applicant is fully compensated, that this building was intended by him in the near future to be the residence of his son or other member of his family, and that no other house reasonably suitable was available in the vicinity. But it lies on the plaintiff or applicant to give affirmative proof of any such considerations wherever they are alleged to exist; and, whatever the fact may be as to them in this case, it is admitted no such proof was tendered or given. How, then, did the case stand as presented before Gibson J.? A continuous letting for many years was proved at a rent of £22 a year, and he has found as a fact that taking one year with another this was its permanent letting value. For myself, I am disposed to think that in a case such as this, not of an isolated building, but of a house attached to and belonging to a farm, a better criterion of its value would be the depreciation in the market value of the farm consequent on the destruction of the only residence upon it; but I am not satisfied that the learned Judge was wrong in adopting the test which was ready to his hand, namely, the use to which during so many years the house was actually put by the owner himself, more especially in the absence of any request by him that any other test should be applied, or any evidence that a greater profit could or would be made in the future by its application to some other

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purpose. Indeed, if the principle of restoration is to be ruled out, I can hardly imagine any other test by which a sum of £1,200, the amount claimed by the applicant, could reasonably be awarded, seeing that if invested even at 6 per cent. it would give him £72 a year instead of the £20 he had previously received. It is not only legitimate, but also, as it seems to me, our duty, to test by extreme cases the propriety of any such principle as that of the invariable application of the cost of restoration; and Mr. Brown, in answer to the Court, was logically compelled to the position that if a family mansion-house which, under the conditions we know to have prevailed throughout Ireland in recent years, had passed to a purchaser for the sum of £5,000, was maliciously destroyed, and could only be restored at a cost of £50,000, by no means a fantastic figure in the present cost of building, that amount and no less must be awarded to the claimant. Many similar illustrations might be taken in the case of extravagant buildings which had long outlived their value or utility to the present owners, and which were more of an incumbrance than profit to them, but in which the same startling result must ensue if, upon their malicious destruction, the owners are to receive the amount required to rebuild them. Finally, Mr. Brown has argued that the question at issue is concluded by the authority of *Duke of Newcastle* v. *Hundred of Broxtowe* (1), which was decided under the English Act, 7 & 8 Geo. 4, c. 31, whereby the hundred was made liable for the malicious destruction of houses by rioters. I confess that this case has created in my mind considerable doubt and difficulty, especially as Mr. Brown has most properly relied upon *Worthington's Case* (2), recently decided by this Court, in which, in my judgment at least, this English decision was referred to without disapproval. The Duke of Newcastle was the owner of Nottingham Castle, but the evidence established that for over a century it had ceased to be occupied by the family, certain portions of the park attached being let on building leases, while the castle itself had been divided into two dwelling-houses, which together were let at an annual rental of £171 at the date of their malicious destruction. In the suit against the hundred the plaintiff produced a witness who estimated the cost of restoration

(1) 4 B. & Ad. 273. (2) [1920] 2 I. R. 233.

at £31,280, while for the hundred three expert witnesses were called, of whom one gave three estimates: first, thirty years' purchase of the net rental, equivalent to £5,130; second, the saleable value of the materials, £5,081; and third, the cost of restoration, £15,386. The second witness for the defence estimated the cost of restoration at the same figure, while the third put it at £21,000. The case was tried by Vaughan B., who left the question of damages in general terms to the jury, without any special direction as to the principle upon which they should be ascertained, and they found for the plaintiff in the sum of £21,000. Upon a new trial motion counsel for the hundred contended that the evidence had established that the castle had been definitely abandoned as a residence for the family, and that in the circumstances the true measure of compensation was the capitalized value of the annual rental; but Parke J. in delivering the judgment of the Court, consisting of himself and Taunton and Patteson JJ., said that the jury would have done wrong had they taken into consideration the fact that the castle was an ancient possession of the plaintiff's family, or that he was unlikely to reside there, or that the neighbourhood had become unsuitable for such residence by him; and he then added: "The true question is, what sum of money will repair the injury done by the mob? what will replace the house in the situation and state in which it was at the time of the outrage committed, as nearly as practicable? There seems every reason to believe that the jury have acted on this principle, and, if so, they have done rightly. At any rate, it is impossible for us to say they have done wrong."

As this is the first occasion upon which the net question as to the appropriate measure of compensation for the malicious destruction or injury of a building in the possession of the claimant as owner in fee has had to be determined by this Court, I have carefully and anxiously considered it, more especially with the knowledge that many thousands of pounds depend upon the decision; and in view of the general principle which determines that in actions for trespass to lands or buildings the measure of compensation or damages is the amount in money which will restore the injured person to the position he occupied before the

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trespass, I am forced to the conclusion, agreeing in this respect with counsel for the claimant, that the Court in the *Duke of Newcastle's Case* (1) in approving the application of the principle of restoration did so from regard to the high-handed and malicous character of the trespass; or, in other words, that the compensation might be fixed by a jury at the extreme limit by way of punishment and example, for what Parke J. describes as an outrage by a mob. If I am right in this, I feel not only justified in rejecting it, but compelled to do so; justified by regard to the startling results that would follow from its adoption as invariable and inflexible rule in these applications, and compelled by reason of the decision by this full Court in *Worthington's Case* (2), in which it was held that, as against innocent ratepayers, punitive or exemplary damages should not be allowed, and that the true principle was full compensation in money's number for the injury or loss sustained. In effect, therefore, it comes to this, that the tribunal whose duty it is to award compensation should approach it as a business proposition, paying due regard to the potential as well as to the existing value to the owner of the property injured; and so long as we are satisfied that in the result the claimant has received full pecuniary compensation for the injury, we need not concern ourselves with the methods by which this amount has been ascertained. But had it been my task to ascertain it in this particular case, and had I applied the method adopted by Gibson J., I confess I should have thought that twenty years' purchase of a well-secured rent, payable by the Crown, was inadequate, and that a figure between that and the thirty years allowed by the ratepayers' expert in the *Duke of Newcastle's Case* (1) would have met the justice of this case; but this Court has not the duty of interfering with the award if it has been assessed upon proper principles.

RONAN L.J.:—

The only question in this case is whether Gibson J. should have awarded to the applicant compensation measured by the cost of rebuilding the house. The applicant is under no obligation of

(1) 4 B. & Ad. 273.

(2) [1920] 2 I. R. 233.

any kind to anyone to rebuild the house or pay the cost of doing so. He is liable under the agreement to keep the house in repair, but he can put an end to that by a three months' notice. I based my judgment in *Hepenstall's Case* (1) on the existence of such an obligation, and the measure of damages in an action to enforce it. In my opinion that case has no application to the present. If we reject the view that the cost of rebuilding is the measure of compensation, we have no materials before us to vary the award of Gibson J. Some vague observations were made as to the value of the farm with the house on it and without the house, but there was no evidence before us on the subject. The applicant has apparently found that the most profitable use he could make of the house during a period of many years was to let it as he has done. The only alternatives open to us on the case are: 1, to affirm the decision of Gibson J.; or, 2, to award the sum fixed by him as the cost of rebuilding; and these were the only two really discussed before us. We were not asked either to take evidence ourselves, or to remit the case for evidence to be taken as to any third measure of compensation. We have only jurisdiction in these cases to deal with questions of law, and the only question of law before us is whether Gibson J. was bound to award the cost of rebuilding. For the reasons stated by the Lord Chancellor, I am of opinion that he was not so bound, and that he adopted a legal and what seems to me the best measure of compensation on the facts of the case so far as they are before us.

In this case the only liability to repair that the applicant is under is that under the letting; that liability he can get rid of by a three months' notice. There is nothing in the case at all corresponding to the covenant to deliver up in repair, on which I based my judgment in *Hepenstall's Case* (1). To apply the same principle in this case would lead to extraordinary results. A deserted family residence has an extensive demesne attached to it. A farmer buys the lot for £5,000. He cannot possibly hope to get more than £7,500 for it. The house cost, say, £30,000 to build. It would cost £50,000 to rebuild it now.

(1) [1921] 2 I. R. 165.

Appeal. 1921.

MURPHY v. WEXFORD CO. COUNCIL.

O'CONNOR L.J.:—

I concur in the result. On the question of principle involved in this case I have already expressed my opinion in *Hepenstall's Case* (1), and I refer to my judgment in that case.

Perhaps I may add this. The question of ascertainment of damages is often referred to as a very difficult question of fact, and I suppose it sometimes is. But a jury has to tackle the problem every day, and, when all is said and done, they have, collectively, a quality which eminently qualifies them for the task. That quality is common sense, for it is by the exercise of common sense in weighing damages that one arrives at a just conclusion.

You are not to enrich the party aggrieved; you are not to impoverish him; you are, so far as money can, to leave him in the same position as before. In dealing with buildings destroyed or injured, the following considerations suggest themselves:—What sort of building was it? How was it actually used? Had it a possibility of a different use, a potential use, which an ordinary owner might be reasonably considered as likely to put it to hereafter? Would he, for any reason that would appeal to an ordinary man in his position, rebuild it if he got replacement damages, or is his claim for such damages a mere pretence? And, if he would rebuild, what sort of a house would he put up? Would he rebuild on the same scale, or would he adopt something else equally suitable to his requirements, having regard to modern conditions? And, if he would rebuild, of course he will have a new structure instead of an old one, and a discount must be allowed accordingly. In other words, all the circumstances, and not merely some of them, must be taken into account, and a conclusion will be come to which must frequently, from the nature of the inquiry, be based on rough and ready calculations, and indeed on speculation, but is none the worse for that.

Solicitor for the appellant: *W. F. Hearn.*

R. ST. J. C.

(1) [1921] 2 I. R. 165.

THE KING *v.* JOHN ALLEN (1).

K. B. Div. 1921.

Feb. 9, 11, 12, 24.

Martial Law — Rebellion — Warfare of a guerilla character — Offence not punishable capitally under ordinary law—Sentence of death by military Court—No jurisdiction in Civil Courts to intervene.

The Civil Courts have no jurisdiction durante bello to interfere with the decision of a military Court sitting in a martial law area, even where a capital sentence has been pronounced, and is about to be executed, for an offence not punishable capitally under the ordinary criminal law.

MOTIONS ON NOTICE.

In pursuance of leave granted by the Divisional Court to the defendant to serve Notice of Motion on the President of the Military Court, and the Confirming Authority, and upon General Sir Nevil Macready, General Officer Commanding-in-Chief in Ireland, for an order to set aside, quash, and prohibit the proceedings and sentence of the Military Court passed on John Allen, the following notices, dated the 9th and 10th February, 1921, respectively, were served by the solicitor for the said John Allen on the Chief Crown Solicitor for Ireland, the Commander-in-Chief of His Majesty's Forces in Ireland, and on the President and Members of the Military Court before which the said John Allen was tried, and the Confirming Authority of the said Court :—

"Take notice that by leave of the Court counsel on behalf of John Allen, a prisoner in Victoria Barracks, Cork, will, at 11 a.m., on Friday next, the 11th day of February, 1921, apply to the Court for an order to quash the proceedings at the trial of the said John Allen, at Victoria Barracks, Cork, on the 7th day of February, 1921, and the order made at the said trial on the said date, whereby a sentence of death was imposed on the said John Allen, on the ground that the said proceedings and order were illegal, and made without and in excess of jurisdiction, and on the ground that the tribunal had no authority to impose a death sentence, or order the said John Allen to be sentenced to death, for the offences for which he was tried, which application will be grounded on the affidavit of Denis Boudren, solicitor for the said John Allen, filed this day, the documents in the said affidavit referred to, the nature of the case, and the reasons to be offered."

(1) Before MOLONY C.J., and GIBSON, GORDON, MOORE, and SAMUELS JJ.

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"Take notice that upon the hearing of the application of which notice has been served upon you for a writ of certiorari on behalf of John Allen, an application will also be made to this honourable Court for a writ of prohibition, to be directed to Sir Nevil Macready, the Commander of the Forces in Ireland, Confirming Military Authority in this case, prohibiting him from confirming or permitting the sentence in this case being carried out, and for a writ of habeas corpus to be directed to the Governor of the Military Detention Camp, Victoria Barracks, Cork, or such other person in whose custody the said John Allen now is, to bring up the body of the said John Allen, to be dealt with in due form of law as to the Court may seem meet and just, which application will be made upon the same grounds as the application for a writ of certiorari, and on the ground that the said sentence is contrary to law, and the detention of the said John Allen under said sentence is unlawful, and the said application will be grounded upon the affidavit already filed herein, the documents in said affidavit referred to, the nature of the case, and the reasons to be offered."

The following facts and matters were set forth in an affidavit of Mr. Denis Boudren, solicitor for the accused, who deposed that—

"1. On the 19th day of January, 1921, the said John Allen was arrested near the town of Tipperary by military for being in possession of a revolver, some ammunition, and a book entitled 'Night Fighting.' Some time later the said John Allen was removed to Victoria Barracks, Cork, in military custody, where he is still detained.

"2. I beg to refer to the charge sheet and summary of evidence, and to Army Form W. 3996, served on the accused, and to a copy of the legal submission of counsel for the accused, on which documents, respectively marked with the letters 'A,' 'B,' 'C,' and 'D,' I have endorsed my name previous to swearing this affidavit.

"3. On the 7th February inst., the said John Allen was charged before a Field General Court-martial at Victoria Barracks, Cork, with the following offences: (*a*) committing an offence in that he near Tipperary, in the County of Tipperary, in Ireland, on the 19th January, 1921, was improperly in possession of arms, viz., one revolver; (*b*) committing an offence in that he near Tipperary, in the County of Tipperary, in Ireland, on the 19th January, 1921, was improperly in possession of ammunition, viz., sixteen rounds of revolver ammunition; (*c*) committing an offence in that he near Tipperary, in the County of Tipperary, in Ireland, on the 19th January, 1921, was improperly in possession of a document prejudicial to the restoration of order in Ireland, viz., a book purporting to be an official publication of the Irish Republican Army entitled 'Night Fighting.'

"On the said 7th day of February instant the said John Allen was tried by four military officers at Victoria Barracks, Cork, with being guilty of the said offences. At the said trial counsel for the accused submitted that the

proclamation relied on by the prosecution in the case was invalid in so far as it purported to give the Court power to impose any sentence on the accused other than a sentence authorized by the Common or Statute Law for the offence charged. And that the Crown had no power to create by a mere proclamation a tribunal which should have power to impose a sentence not so authorized, and that accused was not a person subject to Military Law. Counsel for the accused handed to the President of the Court his submission in writing, and same was attached to the record of the proceedings.

"At the termination of the said proceedings an orderly of the Court handed to the accused Army Form W. 3996, signed by the President of the Court. The said Army Form notified the accused he had been found guilty of the aforesaid charges, and that the Court had passed a sentence of death upon him, subject to the findings being confirmed by the proper authority. I am informed and believe that said sentence of death is to be carried out on Tuesday next, the 15th instant."

The charge sheet set out the three offences as above, was signed by the Major-General Commanding the 6th Division, and stated that the accused was "to be tried by Military Court."

The death sentence was in the following form—Army Form W. 3996:—

A. F. W. 3996.

INSTRUCTIONS FOR THE GUIDANCE OF COURTS-MARTIAL WHERE A SENTENCE OF DEATH HAS BEEN PASSED.

To John Allen, Bank Place, Tipperary.

The Court have found you guilty of the following charges:—Being in improper possession of a revolver and sixteen rounds of ammunition, being in improper possession of a book entitled "Night Fighting"; but not guilty of the following charges:

The Court have passed a sentence of death upon you.

The Court have made no recommendation to mercy.

You should clearly understand:—

(i) That the finding or findings and sentence are not valid until confirmed by the proper authority.

(ii) That the authority having power to confirm the finding or findings and sentence may withhold confirmation of the finding or findings; or may withhold confirmation of the sentence; or may mitigate, commute, or remit the sentence; or may send the finding or findings and sentence back to the Court for revision.

If you do not clearly understand the foregoing, you should request to see an officer, who will fully explain the matter to you.

————, Colonel,
President, Military Court.

Cork. Place.
7th February, 1921. Date.

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The following affidavit, sworn by the Right Honourable Sir Cecil Frederick Nevil Macready, G.C.M.G., K.C.B., General Headquarters, Irish Command, Parkgate Street, Dublin, General Commanding-in-Chief the Forces in Ireland, was filed on behalf of the Crown:—

1. I am the General Commanding-in-Chief His Majesty's Forces in Ireland, and the facts hereinafter stated are within my own knowledge, save as where herein otherwise it appears.

2. On and prior to the 1st day of July, 1920, and since said date to the present time a state of open rebellion has been and is in existence in, amongst other places, the County of Tipperary, North Riding, and the County of Tipperary, South Riding, the City and County of Cork and adjoining districts, such state of rebellion amounting to actual warfare of a guerilla character.

3. Most of the police barracks in the districts referred to have been destroyed or attacked, and in some cases attacked and injured more than once; many of the police have been killed or wounded in these attacks; ambushes have been prepared by night and day against His Majesty's soldiers and police, and in carrying out these attacks and ambushes the members of the rebel organizations have used bombs, rifles, shot guns, and revolvers, and large supplies of petrol for purposes of arson. Numbers of His Majesty's soldiers and police have been attacked, and have sustained many casualties, entailing loss of lives and serious injuries. His Majesty's mails have been continually raided, trains have been repeatedly held up, and Government offices have been attacked throughout the country.

4. The aforesaid acts, and many others of a similar nature, have been done by a force known as the Irish Republican Army or Irish Volunteers, who have been continuously engaged in armed rebellion. The said rebel forces are organized as a trained and disciplined military force, under a general scheme modelled on the former organization of the British Army, divided up into brigades, battalions, and companies. The chiefs of the said rebel organization issue military orders, have a general headquarters, and are continuously engaged in levying guerilla warfare against the forces of the Crown. The scheme of the said warfare does not entail fighting in distinctive uniforms, or in accordance with the laws of war, but under a system of guerilla attacks, in which inhabitants, apparently pursuing peaceful avocations, suddenly come together, and carry out guerilla operations, which often result in the death of or serious injuries to members of His Majesty's forces and police at the hands of the people who are posing as peaceful civilians. For the information of this Honourable Court I beg to refer to photographic copies of a few of the orders actually issued by the rebel organization referred to, which I have placed in an envelope, and upon which, marked "A," I have endorsed my name before swearing this affidavit. From a perusal of these,

and of many documents of a similar nature in the hands of the Crown, it is clear that a state of rebellion amounting to war of the nature above described is, and has been before and since the said 1st day of July, 1920, raging in, amongst others, the districts hereinbefore mentioned.

5. Amongst the documents referred to in paragraph 5 hereof, copies of a publication styled "An T'Oglac" have from time to time been found in the possession or under the control of members of the rebel army. In an issue of said publication, which is dated January 31st, 1919, the following, inter alia, is published:—"'Dail Eireann,' in its message to the free nations of the world, declares a 'state of war' to exist between Ireland and England—a fact which has been recognized and acted on by the Volunteers almost from their inception. It further declares that that state of war can never be ended until the English military invader evacuates our country. We have thus a clear issue laid down, not by anybody that could be termed militarists or extremists, but by the accredited representatives of the Irish people, met in solemn session, in a document drawn up with the utmost care, and a full sense of responsibility, and unanimously adopted. The 'state of war' which is thus declared to exist renders the national army the most important national service of the moment. It justifies Irish Volunteers in treating the armed forces of the enemy, whether soldiers or policemen, exactly as a national army would treat the members of an invading army. It is necessary that this point should be clearly grasped by volunteers. Every volunteer is entitled, morally and legally, when in the execution of his military duties, to use all legitimate methods of warfare against the soldiers and policemen of the English usurper, and to slay them, if it is necessary to do so, in order to overcome their resistance. He is not only entitled but bound to resist all attempts to disarm him. In this position he has the authority of the nation behind him, now constituted in concrete form. From this day the recruiting, arming, equipping, and drilling of the army of Ireland must be pushed on with even more enthusiasm, earnestness, and speed than before. Every young man in Ireland who by his support of the Republican Party has declared his acceptance of the principles which they enunciate, and his allegiance to the Irish Republic, must be made to understand that he thereby pledges himself to fight for these principles to fight for the Republic. His place is in the ranks of the Irish Volunteers, and those who are already in the ranks must understand that there never was a time when slackness or lukewarmness were less justified—never a time when men could face risks with a clearer conscience or a calmer confidence of ultimate victory."

In an issue of the said publication purporting to be published on the 1st day of October, 1920, the following, inter alia, is published:—

"Besides being more extensive in the area of activity, the national war is always more unified and concentrated in aim. For the first time Irish national forces are acting in the interests and under the direction of a National Government that is sure of itself, and definite in its aim, unlike

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the confederation of Kilkenny, that was neither sure of itself nor definite in its aim. A national army acting with singleness of purpose has an enormous advantage over any enemy acting in purely sectional or imperialistic interests.

"Definiteness of aim follows as a result of all this, and our definite aim is the destruction of the invader's power by the destruction of his armed forces and strongholds. This destruction we are achieving bit by bit, and at a steadily increasing rate. To realize this, it is necessary to look back a bit to the beginning of the present year; for example, the numbers of the invaders in Ireland is now greater than it was then—in fact, they are once and a half as great. But their value as a fighting force is very much less. They have lost the initiative, their attempts to recover it have been futile, and their morale is lowered to an extraordinary degree.

"On the other hand, our own forces have gained enormously in value. Our numbers are greater; our organization is more widespread and more uniform; our training is greatly advanced; our morale is thoroughly sound; not only so, but we are still improving; nothing succeeds like success; and we can honestly say that the Irish Republican Army is doing well in all respects; yet there must be no easing up for all that." I refer to copies of said issues of 31st January, 1919, and 1st October, 1920, which I have placed in an envelope marked "B," on which I have written my name prior to swearing this affidavit.

6. In consequence of the condition of the said County of Tipperary (North Riding), the said County of Tipperary (South Riding), the City and County of Cork, and several adjacent counties, His Majesty's Lord Lieutenant for Ireland, His Excellency Viscount French of Ypres, under the authority and exercising the prerogative of the Crown by a proclamation dated 10th day of December, 1920 (1) (on a copy whereof marked "C" I have endorsed my name before swearing this affidavit), proclaimed that amongst other counties the County Tipperary (North Riding) and County Tipperary (South Riding) were and until further order should continue to be under and subject to Martial Law; and I, the deponent, published my proclamation dated the 12th December, 1920 (2) (on a true copy marked "D" I have endorsed my name before swearing this affidavit), and to which I beg to refer. The town of Tipperary is situate in the County of Tipperary (South Riding).

7. I say that I am informed and believe that since the 1st day of July, 1920, in the said Martial Law area six military officers have been murdered, sixteen wounded, and that five are missing, and of other ranks twenty-four have been murdered, eighty-one wounded, and one is missing. During the same period and in the same area I am informed and believe that of His Majesty's police forces sixty-two have been murdered and thirty wounded; and I charge that all these casualties have been brought about by the actions of the rebels above referred to. The said guerilla warfare is still raging in the said Martial Law area.

(1) See ante, p. 198.

(2) See ante, pp. 199, 200.

8. In view, therefore, of the said state of armed insurrection prevalent in the parts of Ireland specified in the proclamation aforesaid, and by reason of the consequences of the said insurrection as above set out, the duty has devolved upon me as Commander-in-Chief of His Majesty's Forces in Ireland to take such measures and to issue such orders as are necessary for the suppression of the said insurrection and for the maintenance of good order. In the performance of this my duty I have issued and have authorized the General Officer Commanding in the parts of Ireland aforesaid to issue such orders as are necessary for the said purposes, and in particular for the holding of Military Courts in such manner as may be necessary. In pursuance whereof and by virtue of my executive authority, and not otherwise, proceedings have been taken in the case of the said John Allen, and the charges made against him were duly and properly tried, not by a Field General Court-martial, as averred in the affidavit of Mr. Boudren, but by a Military Court acting under my authority as aforesaid, under which authority also, and not otherwise, the said John Allen is now held in custody. And it is hereby submitted to this Honourable Court, that by reason of the facts aforesaid, the jurisdiction of this Honourable Court does not extend to the said proceedings, or to the custody in which the said John Allen is now held.

9. I further state that in view of the conditions hereinbefore deposed to, and the long warning that has been given to all disaffected persons, as to the consequences to anyone found carrying arms or other lethal weapons in the Martial Law area, there can be no doubt that persons found with such weapons unlawfully carry them for the purpose of murder; and I considered and consider it absolutely essential in order to put an end to the terrible murders now so frequent, and for the suppression of the said insurrection, that the unlawful carrying or possession of such weapons should be punishable by death.

I further state that no date has yet been appointed for the execution of the said John Allen, and that it is inaccurate to state that it has been decided that the sentence is to be carried out on the 15th instant.

This affidavit is filed on behalf of the Crown by Sir Henry Arthur Wynne, Chief Crown Solicitor for Ireland, of the Chief Secretary's Office, Dublin Castle.

Healy K.C., *Lynch K.C.* (with them *D. B. Sullivan*), for the accused.

The Attorney-General (*Denis Henry K.C.*, *M.P.*) and *Serjeant Hanna K.C.* (with them *Lipsett*), for the Crown.

Healy K.C. read the notice of motion and supplementary notice for writs of prohibition and habeas corpus; and said that before reading the affidavits, he desired to state the grounds on which he moved.

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These, said counsel, were prepared before an affidavit of General Sir Nevil Macready was put into my hands two minutes ago. He states that whatever was done, was done by virtue of his executive authority, and not otherwise. Mr. Healy proceeded :—

My argument will follow these grounds—1, every offence charged before a Court-martial or a Military Court must be one cognizable at law; 2, no tribunal has power to create or invent new offences ; 3, the prisoner has been sentenced for an act in respect of which no penalty exists, and which is not a crime or offence; 4, the second charge on which the prisoner has been convicted is one for which a minor penalty has been prescribed ; 5, the prisoner, although not a soldier, has been tried under a code inapplicable to civilians; 6, no death sentence can be imposed for an "offence"; 7, neither at common law, statute, nor military law can a prisoner who surrenders be condemned to death upon the charges framed against the accused; 8, where the procedure for the trial of an offence is statutory, the statutory penalty alone, in the absence of authority to the contrary, can be inflicted.

In consequence of the affidavit of General Sir Nevil Macready, I make the additional submission that a state of rebellion, such as General Macready alleges, does not give the General Officer Commanding authority to inflict the death penalty except during actual conflict, hot pursuit, or attempt to escape; and, further, there is no power known to military law to set up the tribunal challenged here.

[Counsel read the affidavit of Mr. Boudren, solicitor for the accused; also the conviction document served on the prisoner.] The conviction was a general sentence of death in respect of each charge. My client has been found guilty, and sentenced to death on each charge. It will be observed from the conviction document that my client was nineteen days in custody before trial. [Counsel read from a document headed "Instructions for the guidance of Courts-martial where a death sentence has been passed."] The document also stated that the Court had made no recommendation to mercy, and was not valid until confirmed by the proper authority. And it contained this extraordinary statement : "If you do not clearly understand the foregoing, you should request to see an officer, who will fully explain the matter to

you"—some officer who had not been there at all perhaps, who had just come over from England, or India, or South Africa, who was posted to Cork an hour before. The prisoner in this case was what might be called a manufactured rebel. His father's house had been burned down, and his case was that he had a revolver to defend himself.

[Counsel referred to the objection lodged by Mr. John F. Burke, prisoner's counsel, with the Cork tribunal, and to the evidence given at the trial.] The evidence was to the effect that the accused had been held up by a military party travelling in a Crossley tender from Tipperary to Galbally, and that the revolver, ammunition, and book entitled "Night Fighting" had been found in his possession. One of the witnesses stated that the accused said that he had been hounded out of the town by the police, and carried the revolver and ammunition for his protection. In this case there was no charge of high treason, no charge of levying war against the King, no charge of conspiracy, no allegation of felony, no allegation of crime. The technical word which was given a meaning by the Restoration of Order in Ireland Act, "offence," was the only charge made. Contrast that with the affidavit of General Macready, which, counsel submitted, put the Crown out of Court, because it was an affidavit showing rebellion, insurrection, murder, and the existence of what in the North of Ireland would be called "civil war," but in the south was called "rebellion."

There is no proof that the prisoner was a member of the I.R.A., and why was not rebellion charged? [Counsel asked for proclamation headed "Proclamation No. 1," and read it.] There is nothing in the proclamation making the prisoner liable to death for having a seditious document upon him. For having this document on him the death sentence was imposed. Counsel referred to the proclamation by the Lord Lieutenant in December, 1920, placing Cork and other parts of the country under martial law, and submitted that that proclamation could add nothing to the principle that if a force opposed the forces of the King, force could be repelled by force. Comparing that proclamation with the one issued by Lord Wimborne in 1916, establishing martial law, the latter contained a provision that "all persons found carrying arms without lawful authority are liable to be dealt

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with by virtue of this proclamation." Whatever might be the effect of the proclamation, it conveyed a warning that persons found in possession of arms were liable to be dealt with summarily. The omission of that from the later proclamation of Lord French was remarkable; and that it should be found to have annexed to it that, after trial by a military court, sentence of death could be pronounced was a new feature of the constitution. Military Courts could only deal with military men, unless General Macready enjoyed statutory authority.

The question of insurrection or of rebellion is a question of fact. If there were the state of rebellion alleged in the present case, and punishment became necessary, it could not be inflicted in the circumstances shown here, nor by such a military Court on such a charge, in the absence of statutory power. As to the Restoration of Order Regulations, Parliament had to grapple with the same thing which General Macready and Lord French dealt with in the proclamation; but Parliament did not contemplate the setting up of such authority as General Macready had asserted. Further, there were safeguards, such as having a legal member of a Court in a case which might be punishable by death. Were all these safeguards to be destroyed? The statute was only four months old when General Macready appended punishment by death where Parliament only authorized punishment by two years' imprisonment.

In *Wolfe Tone's Case* (1) the Court, on an ex parte application, issued a writ of habeas corpus in the midst of rebellion; in the midst of an armed invasion by a Great Power. The writ was issued to try a question of fact, and it required a section of the 39 Geo. 3, c. 11, to provide that it would be a sufficient return to a writ of habeas corpus that the party was detained by warrant of a person authorized, whose name had been previously notified by the Lord Lieutenant or the Governor's Secretary to the King's Bench, and then the body need not be brought up.

An examination of the statutes from 1801 to 1833 shows that it was not the view of Parliament that a General Officer Commanding can set up such a tribunal as this military Court, and for what is described as an "offence" inflict the death penalty.

(1) 27 State Trials, 613.

The Restoration of Order in Ireland Act is the most elastic and comprehensive Act that Parliament has ever devised for dealing with Ireland, and gives the widest possible powers to the Executive. It provides, however, that in the case of a person triable for an offence punishable by death, the Court must include one member of whose legal knowledge the Lord Chancellor or the Lord Chief Justice of England was satisfied. When that Act was passed the rebellion was in full swing. It was because of the existence of rebellion that Courts-martial were created by the Act; but Parliament was cautious that the death penalty should not be inflicted without the presence as one of the Court of a legal member. [Counsel then summarized the powers given to the Executive by the Restoration of Order Act and the Regulations made thereunder.]

A week after the passing of the Restoration of Order in Ireland Act, the Fire Arms Act, 1920, was passed, with full knowledge of the condition of Ireland, and, in applying the Act to Ireland, it is provided by sect. 18, sub-s. 5, that "in the provisions as to penalties 'two years' shall be substituted for 'three months' as the maximum term of imprisonment." That statute was only four months old when General Macready substituted the penalty of death. Parliament has never entrusted to a military officer, however high his rank, a power to legislate. One might as well kill a wounded man as a prisoner. Once a person is reduced to powerlessness, he must be dealt with according to law. [Counsel referred to 3 & 4 Wm. 4, c. 4, sects. 13 to 18, and to sects. 26, 28, and 40.]

The Act of 1833 (3 & 4 Wm. 4, c. 4) was to be in force for only one year. The powers claimed in the present case are without limit in point of time. The statute 40 Geo. 3, c. 2, revived and amended the Act of the previous year. The amendment was more liberal; it provided that Courts-martial shall consist of commissioned officers, not less in number than three nor exceeding thirteen. [Counsel referred to the preamble of 41 Geo. 3, c. 14.]

What is a military Court? It is a Court for dealing with the military, and it required a statute to enable such a Court to deal with civilians. Where does General Macready get power to

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set up such a Court and invest it with authority to proceed to punish His Majesty's subjects, whether for the possession of arms or literature, or to deal with prisoners taken on the field in open rebellion—for I will go that length? He cannot usurp the functions of His Majesty. His authority cannot be found in the Viceregal proclamation.

The military can only deal with an opponent in flagrante bello. Once a person is taken into proper custody, the Commander-in-Chief has no power to set up a Court to punish him. Parliament has given ample power to Courts-martial to inflict the death sentence in certain cases, on an apt indictment or charge properly framed. It may well be that persons now in prison may be charged with compassing the death of the King, and a Court-martial, duly convened, would have power to inflict the death sentence; but when Parliament has given full powers to deal with rebellion, it is plain that a Commander-in-Chief cannot exercise new powers. The procedure adopted and the forms used in this case were the procedure and forms under the Restoration of Order in Ireland Act and the Army Act, but the penalty inflicted was not authorized by either statute. [Counsel then read passages from Forsyth's Constitutional Law, 1869 edition, at pp. 198, 201, 204, 208, 211, and 212.]

Marais's Case (1) does not apply. It was a question there of detainer, and Mr. Haldane's application was for leave to appeal from a refusal to grant habeas corpus by a South African Judge. It was refused because what was done was done in the course of the war. See charge of Palles C.B. in *Rainsford* v. *Browne* (2).

Regulations 56, 57, 59 of the Restoration of Order in Ireland give powers to Courts-martial by Regulations as regards "offences," and the supplemental Regulations at p. 81 of the Regulations deal with "crimes"; also the Regulations at p. 84 deal with the attendance of witnesses. Where is the power in General Macready's military Court to administer an oath or to punish for perjury? The establishment of such a Court as had been set up in the present case was an invasion, not only of the rights of the subject, but of the rights of the King. The Court of King's Bench would be

(1) [1902] A. C. 109.

(2) 2 N. Ir. Jur. Repts. 179.

vindicating the power of the Crown, and not lessening it, by insisting that the servants of the Crown, whether they were in uniform or in silk, shall pursue the law. I submit that in the present case no authority whatever existed, or could exist, for the assertion of the power of life and death by the Court. The military could shoot persons found in insurrection, but it must be in the heat of the affray. They could kill, but it must be killing according to law. They could not kill by Courts except the Courts that had been given the power to kill. The Indemnity Act of 1920 (10 & 11 Geo. 5, c. 48) was found necessary to validate sentences by military Courts during the war. In the words of Lord Chief Justice Cockburn in the *Jamaica Case* (1): "There are considerations more important even than shortening the temporary duration of an insurrection. Among them are the eternal and immutable principles of justice—principles which can never be violated without lasting detriment to the true interest and well-being of a civilized community."

The Attorney-General (*Denis S. Henry K.C., M.P.* (*Serjeant Hanna K.C.* and *Lipsett* with him)) :—

The two important propositions which seem to me to underlie Mr. Healy's argument are these: that the effect of the Restoration of Order in Ireland Act is in some way to reduce or lessen the power of the Crown to proclaim martial law, and to prevent the military from exercising rights or performing duties under military law which they formerly could perform, and that there might be power to take the life of a person with arms in his hands during rebellion, but that power is lost as soon as the person is taken prisoner.

Most of the passages cited from the authorities by Mr. Healy have no application, for passages dealing with cases of terminated rebellion could have no application at all to a case where rebellion still exists. Did a rebellion still exist in Ireland? There was an affidavit by the Commander-in-Chief of the Forces in Ireland, stating, not merely the fact, but pledging his oath to the existence of it, and giving numerous instances showing the prevalence of that rebellion. There is no suggestion that there is no rebellion

(1) (1868) Finlason's Report.

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in the affidavit on the other side, and there is no replying affidavit General Macready pledges his oath that it is necessary, with a view to the suppression of the rebellion, to make the carrying of arms a capital offence. What is the result of that? Whether it is rebellion or war, it is actually raging. I refer the Court to a passage from Hale's History of the Common Law. There is an analysis of the law at the end of the volume in which one of the King's prerogatives that relate to war is stated to be—"He may punish them by martial law during insurrection or rebellion, but not after it is suppressed." And your Lordships will see that the real test is—even from the passages cited by my learned friend—has the rebellion been suppressed? Counsel then referred to the joint opinion of Sir John Dodson and the Attorney-General and Solicitor-General, Sir John Campbell and Sir R. M. Rolfe, at p. 201 of Forsyth's Constitutional Law: "Martial law is merely a cessation from necessity of all municipal law; and what necessity requires, it justifies. An alien hostilely invading the English territory while in arms might lawfully be put to death, and when taken prisoner, if his immediate execution were necessary to the suppression of the insurrection, he might be executed immediately, without any reference to municipal law. But the insurrection being quelled and tranquillity restored and the ordinary tribunals proceeding regularly in the administration of justice, an alien who had been taken in arms could not be lawfully put to death, either with or without the form of being tried by Court-martial, and all who should take part in such an execution would be guilty of murder."

While the rebellion exists, the rights of the military authorities do not cease with the arrest of a man. They are not bound to send their prisoner into eternity on the spot. The mere fact of taking a man into custody does not lessen their power to deal with him: *Marais's Case* (1). Palles C.B. refers to it in his charge in *Rainsford* v. *Browne* (2), but I think he must be misreported, for Marais was not an officer or a soldier; he was an ordinary rebel. The Lord Chief Baron is reported as saying, with reference to a decision of the Privy Council of England: "Well, I accept, as I am bound to do, with the greatest respect, and (whatever my own

(1) [1902] A. C. 109. (2) 2 N. Ir. Jur. Repts. 179.

opinion may be) I am prepared to act upon the decision referred to, so far as it relates to a matter of the same character as that which was there before the Privy Council—that is, the right to try by a Court-martial a man who is a military man."

[Gordon J.: I was counsel for the defendant in that case. The plaintiff was arrested by a military officer for disobeying certain orders, and the case the defendant made was that the plaintiff was in the same position as a subordinate officer, and came directly under military law. It was not as a civilian he was being dealt with.]

The Attorney-General: The matter in *Rainsford* v. *Browne* (1) arose after the rebellion. Marais was a rebel; he was not a British subject.

[Molony C.J.: He may have been a British subject, but he could not have been described as a person coming under British military law. He was detained by an order of the military authorities for "contravening Martial Law Regulations, pars. 14, 52, of May 1st, 1901," and these regulations are set out in the Lord Chancellor's judgment at p. 113 of the report of the case. (The Lord Chief Justice read Regulation No. 14 from the report.)]

The Attorney-General: Your Lordship will see that in that case Mr. Haldane in his argument pressed the very passage from the joint opinion of Sir John Campbell and Sir R. M. Rolfe which Mr. Healy has cited, and pointed out that their opinion was that "when the regular Courts are open so that criminals might be delivered over to them to be dealt with according to law, there is not, we conceive, any right in the Crown to adopt any other course of proceeding," so that, I submit, there can be no doubt as to the ground of the decision in *Marais's Case* (2). Being a matter before the Privy Council, it would not appear on the face of the proceedings, whether or not there was a difference of opinion amongst the members of the Council; but the Lord Chancellor, who delivered the judgment, said (page 114 of the report): "The question was as fully argued before their Lordships by the learned counsel as it could have been argued if leave to appeal had been given, and their Lordships did not think it

(1) 2 N. Ir. Jur. Repts. 179. (2) [1902] A. C. 109.

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right to suggest any doubt upon the law by giving special leave to appeal where the circumstances render the law clear. They are of opinion that where actual war is raging acts done by the military authorities are not justiciable by the ordinary tribunals." The judgment continues: "Martial law had been proclaimed over the district in which the petitioner was arrested and the district to which he was removed. The fact that for some purposes some tribunals had been permitted to pursue their ordinary course is not conclusive that war was not raging. That question came before the Privy Council as long ago as the year 1830"; and then the Chancellor refers to *Elphinstone* v. *Bedreechund* (1) and to Lord Tenterden's judgment in that case, in which he said: "We think the proper character of the transaction was that of hostile seizure made, if not flagrante, yet, nondum cessante bello, regard being had both to the time, the place, and the person, and, consequently, that the municipal Court had no jurisdiction to adjudge." That was very strong.

[Molony C.J.: That must, of course, be read in connexion with the subject-matter. It was a case of seizure or detention.]

The Attorney-General: The illegality was the same. The test is actual war.

[Gibson J.: On the 9th August, 1920, an elaborate statute was passed, and again on the 16th August, 1920, another statute, either of which could have been used.]

The Attorney-General: These two Acts apply to all Ireland. As they stand there is no restriction on them. Does it amount to this, that even where there is invasion or rebellion nothing can be done except under the Restoration of Order Act?

[Molony C.J.: Is it clear that as far as the rebellion of 1916 is concerned, there was no conviction by a military Court as distinct from a Court-martial?]

The Attorney-General: I think in capital cases that is so, but I cannot at the moment say. [Counsel then referred to the case of *Attorney-General for the Cape of Good Hope* v. *Van Reenen* (2) and *Tilonko* v. *The Attorney-General of the Colony of Natal* (3) as supporting his propositions.]

(1) 1 Knapp, P. C. 316. (2) [1904] A. C. 115.
(3) [1907] A. C. 93 and 461.

If you once come to the conclusion that there is rebellion or war, you cannot hold the hands of the military by any decision of the civil tribunal. You cannot tie up a soldier who is defending his country in that way. In *Rainsford's Case* (1) the Chief Baron was dealing with a case after war had ceased. I would be in a different position if I were arguing this case post bellum. Post bellum persons might be amenable if an Act of Indemnity were not passed.

[Molony C.J.: Do you say that the last question put to the jury in *Rainsford's Case* (1) was unnecessary?]

The Attorney-General: I do; and I also say that an action after rebellion is a different thing from proceedings to quash a decision of a military Court during war.

[Gibson J.: Is there any instance of a declaration of war without the authority of the Crown?]

The Attorney-General: I care nothing about proclamations. It is the state of fact that matters. What has been done has been attracted by the state of war.

[Gibson J.: Is there any instance of a man taking upon himself this responsibility without authority?]

The Attorney-General: He is the military authority, and dealing at the moment with enemies of the King. In *Tilonko* v. *Attorney-General of Natal* (2) the following passage will be found at p. 94 of the report of Lord Halsbury's judgment: "It is by this time a very familiar observation that what is called 'martial law' is no law at all. The notion that 'martial law' exists by reason of the proclamation—an expression which the learned counsel has more than once used—is an entire delusion. The right to administer force against force in actual war does not depend upon the proclamation of martial law at all. It depends upon the question whether there is war or not."

[Gibson J.: Can there be war without the action of the King?]

The Attorney-General: It is the action of your opponent. I would refer the Court to a case of habeas corpus in England: *Rex* v. *Governor of Wormwood Scrubbs Prison* (3), a case of

(1) 2 N. Ir. Jur. Repts. 179. (2) [1904] A. C. 93 and 421.
(3) [1920] 2 K. B. 305.

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internment of an Irishman, Patrick Foy, in Wormwood Scrubbs; and a question was raised under Regulation 14 B of the Defence of the Realm Regulations by an application in England for a writ of habeas corpus on the ground that the war was over, and that Regulation 14 B was no longer operative, and that the application of the Regulation to Ireland continued only so long as the special military emergency continued to exist. [Counsel read from the judgment of Lord Reading C.J., pp. 309, 310, and 311 of the report.]

As to the effect of the Restoration of Order Act, and the regulations under it, I wish to point out that the powers given are powers given to His Majesty in Council. There is no limitation to the regulations in point of time, and they are part of the ordinary law of the land. All Ireland is included, and the Act can be put in force for any county. The Act does not lessen the powers of the Crown, but gives further powers. The contention on the other side that in some way the powers of the Crown are lessened or reduced really seems to carry the matter to the verge of legal absurdity. He submitted that the application ought to be refused.

Serjeant Hanna K.C.: Mr. Healy's contention seems to resolve itself into this: that the case was one of a trial by Court-martial under the Restoration of Order Act. He is answered in two ways by the affidavit of General Macready: 1, he states it was not a trial by Court-martial, but by a military Court; and, 2, that when officers of the army are deputed to set up Courts, it is natural that they should use the machinery of the Army Act, with which they are familiar. Similarity of forms or procedure is not conclusive.

The accused here was tried by a Court, and the proclamation authorizes officers to issue such orders as are necessary for the holding of these military Courts. [Counsel also referred the Court to a series of articles on "Martial Law" in the eighteenth volume of the "Law Quarterly Review."]

Lynch K.C., in reply:—

The question which has been raised in this case is whether the Court has jurisdiction to interfere, having regard to the

condition of affairs in the district from which the case comes. I submit that the test to be applied is this: was the act one of military necessity? [Counsel referred to Hale's History of the Common Law, at pp. 34, 35, and 36, and to Sir James Stephen's History of the Criminal Law, vol. i, pp. 207, 212, and 215; to *Wright* v. *Fitzgerald* (1), and to Dicey's Law of the Constitution, 7th edition, p. 289.]

With reference to *Wolfe Tone's Case* (2), it was before the Court in November, 1798. The 39 Geo. 3, c. 11, received the Royal Assent on the 25th March, 1799. It is recited in the forefront of the statute that orders were issued by the Lord Lieutenant to officers to try those in rebellion by martial law, and enacted that no act done in pursuance of such orders should be questioned in the King's Bench Division, and then enacts (section 5) that for the future after the passing of the Act it should be a good return to a writ of habeas corpus if certain things were done. It follows that previous to the 25th March, 1799, it would have been no answer to say that the person was detained under an order of a Court-martial. The section was passed to make it an answer. In *Tilonko's Case* (3) and *Van Reenan's Case* (4) there was an Act of Indemnity passed before any proceedings were taken. The principle that governs the action of a military governor is the same as the law that governs the action of private individuals or numbers of private individuals. If a private individual had a legal right to do a particular thing, to keep property of his own, he was justified in defending that property by force if he was illegally attacked in the possession of it; in some of the cases it had been laid down that the position of a military governor is somewhat analogous to the case of a private citizen, or an aggregate of private citizens protecting their civil rights. The military governor went out to suppress disorder, to suppress rebellion, or to defend what was considered right in war. He was entitled to repel force by force, to slay men who tried to slay him or the men under him; he was entitled to do everything that was just and reasonable, and of military necessity.

(1) 27 State Trials, 765.
(2) 27 State Trials, 614.
(3) [1907] A. C. 93 and 461.
(4) [1904] A. C. 115.

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The importance and force of Mr. Healy's argument was that there was no necessity for the establishment of this Court that had been set up to try the man on whose behalf they were making this application. Long after the 1st of July, when it was stated that this rebellion existed, Parliament dealt with the necessity of the situation by creating exceptional procedure for dealing with offences, whether of an ordinary or unusual kind.

What was to prevent this case from being tried by the same kind of Court-martial that was contemplated by the Restoration of Order Act? Why not in the same way as the man Murphy, whose application was recently before the Court, and who was tried so lately as 15th December? The question the Court would ultimately have to come down to was whether what was relied upon here was an act of military necessity.

[Gibson J.: Do you contend that the declaration as to a state of war was unfounded.] *Lynch K.C.*: I do.

[Gibson J.: Do you argue that the Court set up was incompetent to try the case at all?] *Lynch K.C.*: I do.

[Gibson J.: I should have thought that if a Court was incompetent, no legal remedy existed except habeas corpus; but I see that it has been stated by a Judge that if a Court was a pretended Court they could prohibit it. What did counsel say about the confirming authority? This appeared to be a kind of hybrid tribunal, which utilized to a large extent the procedure under the Act of 1920. Who was to confirm?] *Lynch K.C.*: As regards that, I submit that no one has legal power to confirm the decision of this particular tribunal.

[Gibson J.: Do you say that it was to be confirmed by someone or another, resting on authority subordinate to the Lord Lieutenant?] *Lynch K.C.*: I do not know.

[Gibson J.: It is an important matter that will have to be considered.]

The Attorney-General, in reply to Mr. Justice Gibson, submitted that the question of confirmation has absolutely nothing to say to the matter. If there was no confirmation, it would be the very same thing, because it goes to the jurisdiction of the Court, and these were the words used by Lord Halsbury, in not one, but in two cases.

[Gibson J.: It does not require confirmation at all?]

The Attorney-General: It is not for this Court. Of course where they had active service, even foreign service, all sentences would necessarily come before the Commander-in-Chief; and the Lord Lieutenant, representing His Majesty, who was the supreme Court in all these matters, would also have a say. [Molony C.J.: Between them?]

The Attorney-General: It would go through both of them. The Lord Lieutenant would not operate, of course, except on a petition to him. My proposition is, there is an actual war existing, and this Court has no jurisdiction.

Cur. adv. vult.

MOLONY C.J. delivered the unanimous judgment of the Court:—

By a proclamation of His Excellency the Lord Lieutenant, dated the 10th December, 1920, after reciting that certain evilly disposed persons and associations, with the intent to subvert the supremacy of the Crown in Ireland, had committed divers acts of violence whereby many persons, including members of the forces of the Crown, and other servants of His Majesty, had been murdered, and many others had suffered grievous injuries, and much destruction of property had been caused; and, further, that in certain parts of Ireland disaffection and unrest had been especially prevalent, and repeated murderous attacks had been made on the members of His Majesty's forces, culminating in ambush, massacre, and mutilation with axes of sixteen cadets of the Auxiliary Division, all of whom had served in the late war, by a large body of men who were wearing trench helmets, and were disguised in the uniform of British soldiers, and who were still at large; the Lord Lieutenant thereby proclaimed the counties of Cork, Tipperary, Kerry, Limerick, and the cities of Cork and Limerick to be, and that until further order they should continue to be, under and subject to martial law, and he called upon all loyal and well-affected subjects of the Crown to aid in upholding and maintaining the peace of this realm and the supremacy and authority of the Crown, and to obey and conform to all orders and regulations of the military authority issued by virtue thereof.

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This was followed on the 12th December, 1920, by a proclamation by the Right Honourable Sir Cecil Frederick Nevil Macready, the General Officer Commanding-in-Chief of the Forces in Ireland, in which, having referred to the existence of a state of armed insurrection, he ordered, amongst other things, that all arms, ammunition, and explosives in possession of any person not a member of His Majesty's naval, military, air, or police forces, or who was not in possession of a permit within the said area, should be surrendered by the 27th December, 1920, to such persons and at such places as were thereby directed, and stated that after the 27th December, 1920, any unauthorized person found in possession of arms, ammunition, or explosives would be liable, on conviction by a military Court, to suffer death.

On the 19th January, 1921, John Allen, of Bank Place, Tipperary, a civilian, was arrested near the town of Tipperary, within the area covered by the proclamation, and on being searched there was found in his possession a revolver, sixteen rounds of revolver ammunition, and a book, purporting to be an official publication of the Irish Republican Army, entitled "Night Fighting." A summary of the evidence against him was taken at Cork in his presence on the 2nd February, and on the following day he was served with a charge sheet charging him with being improperly in possession of arms and ammunition, and of a document prejudicial to the restoration of order in Ireland.

The charge sheet was in the form applicable to offences against the Restoration of Order in Ireland Regulations, but contained at the bottom thereof a statement that the accused was "to be tried by military Court." He was accordingly tried before four officers, purporting to act as a military Court, on the 9th February, 1921, and after oral evidence had been given, and the proclamation of the 10th December, 1920, put in evidence, he was found guilty and sentenced to death. The President of the Court utilized Form 3996, intended for Courts-martial, for the purpose of informing the prisoner of the sentence, altering, however, his description from "President, Court-martial," to "President, Military Court."

Mr. Bourke, counsel for the accused, thereupon handed in an objection in writing submitting that the proclamation relied on

by the prosecution was invalid in so far as it purported to give the Court power to impose any sentence on the accused other than a sentence authorized by the common or the statute law for the offence charged, and that the accused was not a person subject to military law. Mr. Bourke and Mr. Bourden, the solicitor for the accused, both seem to have been under the impression that Allen was being tried by a Field General Court-martial, and, if this was so, the objection made on behalf of the accused would have been a formidable one, as the accused could not have been sentenced to death by a Court-martial in proceedings taken under the provisions of the Restoration of Order in Ireland Act, 1920, and the regulations made in pursuance thereof, in respect of the offence with which he was charged. It is, however, clear from the documents in evidence, and is stated positively in the affidavit of Sir Nevil Macready, that the accused was tried by a military court acting under his authority as Commander-in-Chief of His Majesty's Forces in Ireland in the enforcement of martial law.

On the 9th February, 1921, Mr. Healy K.C. applied to this Court for a conditional order for a writ of prohibition directed to Sir Nevil Macready, prohibiting him from confirming or permitting the sentence in this case to be carried out; for a writ of habeas corpus directed to the Governor of the Military Detention Camp, Victoria Barracks, Cork, to bring up the body of the said John Allen; and, further, for a writ of certiorari to quash the proceedings, on the ground that the proceedings and order were illegal, and made without and in excess of jurisdiction, and that the tribunal had no authority to sentence the said John Allen to death for the offence for which he was tried. As it was stated that the sentence of death was to be carried out on the 15th February, 1921, the Court, instead of granting a conditional order, allowed notice of motion to be served for the 11th of February, and accordingly the application came on for hearing upon that day.

The Attorney-General, Mr. Serjeant Hanna K.C., and Mr. Lipsett appeared for the Crown, the prisoner being represented by Mr. Healy K.C., Mr. Lynch K.C., and Mr. D. B. Sullivan. The case was very fully and ably argued by counsel on both sides,

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and the discussion at the Bar ranged over a very wide range of subjects, accompanied by numerous citations from text-books and decided cases, with most of which it will be unnecessary to deal in detail.

It is the sacred duty of this Court to protect the lives and liberties of all His Majesty's subjects, and to see that no one suffers loss of life or liberty save under the laws of the country; but when subjects of the King rise in armed insurrection and the conflict is still raging, it is no less our duty not to interfere with the officers of the Crown in taking such steps as they deem necessary to quell the insurrection, and to restore peace and order and the authority of the law.

In the present case the issue is clearly knit. John Allen comes to this Court for relief on the ground that he had been tried by a Court not recognized by law, and sentenced to a punishment not authorized by law. Sir Nevil Macready, on the other hand, says that by virtue of his authority as Commander-in-Chief, acting in the execution of martial law, proceedings were taken in the case of John Allen, and that the charges against him were duly and properly tried by a military Court acting under his authority, and that John Allen is now held in custody under his authority and not otherwise. He justifies his action on the ground that actual war is still raging, and that the steps taken by him are necessary for the suppression of the insurrection and for the maintenance of good order, and that consequently this Court has no jurisdiction to interfere.

We propose to deal with four questions:—

1. Was there a state of war in the area included in the Lord Lieutenant's proclamation justifying the application of martial law?

2. What are the powers of the Executive Government in dealing with an armed insurrection?

3. Could the military Court act, having regard to the fact that Courts of Justice in the area were open?

4. Could the military Court impose a sentence of death, (*a*) having regard to the provisions of the Restoration of Order Act, 1920, and the regulations made thereunder, and the

Firearms Act, 1920, which imposed minor penalties for the same offence, (*b*) having regard to the fact that the accused was not caught in actual conflict or fresh pursuit?

As regards 1, it is necessary to refer to the affidavit of Sir Nevil Macready, which described in some detail the nature of the present rebellion. After stating that on and prior to the 1st July, 1920, and since said date to the present time, a state of open rebellion has been and is in existence in, amongst other places, the County of Tipperary, North Riding, and the County of Tipperary, South Riding, the City and County of Cork and adjoining districts, such state of rebellion amounting to actual war of a guerilla character, he proceeds to give instances of the nature of the operations of the force known as the Irish Republican Army or Irish Volunteers. He says: "Most of the police barracks in the districts referred to have been destroyed or attacked, and in some cases attacked and injured more than once; many of the police have been killed or wounded in these attacks; ambushes have been prepared by day and night against His Majesty's soldiers and police, and in carrying out these attacks and ambushes members of the rebel organizations have used bombs, rifles, shot guns, revolvers, and large supplies of petrol for the purposes of arson. Numbers of His Majesty's soldiers and police have been attacked and have sustained many casualties, entailing loss of lives and serious injuries. His Majesty's mails have been continually raided, trains have been repeatedly held up, and Government offices have been attacked throughout the country." In proof of his statement that a state of war exists, he refers to copies of a publication called "An T'Oglac," which had from time to time been found in the possession or under the control of members of the rebel army, in which it is stated that war exists between England and Ireland, and he gives figures showing the losses that the Crown forces have sustained in the martial law area since the 1st July, 1920. In view of the facts stated and relied on by Sir Nevil Macready, and which have not been contradicted by any affidavit on behalf of the prisoner, it is impossible not to come to the conclusion that at the time of the Lord Lieutenant's proclamation a state of war actually existed and continued to exist at the time of the arrest of John Allen, and since then down to the present time.

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As regards 2, we next proceed to consider the powers of Government in dealing with such an armed insurrection. Before, however, proceeding to discuss the present state of affairs, it is desirable to say something on the historical aspect of the question.

There have been many instances in our history of insurrections and rebellions, such as Wat Tyler's, in the time of Richard II; Jack Cade's, in the time of Henry VI; Perkin Warbeck's, in the time of Henry VII; the Northern rebellion, in the time of Henry VIII; Sir Thomas Wyatt's, in the time of Queen Mary; Monmouth's, in the time of James II; the invasions and insurrections of 1715 and 1745; and the Irish insurrection of 1798. All these were exhibitions of armed force publicly displayed in the field, and were followed in most cases by Indemnity Acts, many of which are enumerated by Mr. Justice Willes in *Phillips* v. *Eyre* (1), intended to relieve magistrates and others in respect of illegal acts done by them in the honest execution of what they believed to be their duty. Confining ourselves for the moment to Ireland, we find in the troubled years at the end of the eighteenth century three different kinds of legislation:—(A) Habeas corpus was temporarily suspended by 37 Geo. 3, c. 1; 38 Geo. 3, c. 14 & 21. (B) Indemnity Acts were passed, such as 36 Geo. 3, c. 6; 38 Geo. 3, c. 74; and 39 Geo. 3, c. 50; but none of these Acts appears to have contemplated either Courts-martial or death sentences. (C) Acts were passed giving statutory effect to proclamations of the Lord Lieutenant, such as 37 Geo. 3, c. 38, and 39 Geo. 3, c. 11. The last-mentioned Act, to which Royal assent was given on the 25th March, 1799, is worthy of particular notice. It recites Lord Camden's proclamation of the 30th March, 1798, requiring the officers commanding His Majesty's forces to employ them with the utmost vigour and decision for the immediate suppression of the then rebellion, and a further proclamation of the 24th May, 1798, requiring general officers commanding His Majesty's Forces to punish all persons acting, aiding, or in any way assisting in the said rebellion, according to martial law, either by death or otherwise, as to them should seem expedient; and that His Excellency had by message communicated his said orders and proclamations to the Lords

(1) L. R. 6 Q. B. 1, 17.

Spiritual and Temporal and Commons then in Parliament assembled, who did by their addresses to His Excellency express their entire approbation of the decisive measures so taken by His Excellency, however deeply they lamented the necessity by which they were dictated; and recites further that the peace of the Kingdom had been so far restored as to permit the course of the Common Law partially to take place, but that the said rebellion still continued to rage in very considerable parts of the Kingdom. The Act then provided that the Lord Lieutenant might issue orders to officers and others during the rebellion, whether the Courts of Justice were open or not, to take the most vigorous means for suppressing the rebellion, and to punish persons assisting in the furtherance of the said rebellion, according to martial law, either by death or otherwise as to them should seem expedient. The Act further provided for the assembly of Courts-martial to try persons in a summary manner, and to be constituted of such persons as the Lord Lieutenant should direct. It further provided that acts done in pursuance of the orders of the Lord Lieutenant should not be questioned, and that officers and soldiers should be responsible to Courts-martial only for acts done under the said orders, and that if a writ of habeas corpus was obtained from the King's Bench Court, it would be sufficient return that the party was detained by a warrant of a person, whose name should have been previously notified by the Lord Lieutenant or the Chief Secretary in writing to the said Court of King's Bench. This statute was only to continue in operation until the first day of next session of Parliament and two months after. It was, however, continued in operation until the 25th of March, 1801, by the statute 40 Geo. 3, c. 2, which latter statute provided that Courts-martial constituted under the authority of the Act should consist of commissioned officers not less in number than three and not exceeding thirteen; and by 41 Geo. 3, c. 14, the minimum of three was increased to seven; and it was further provided that no sentence of death should be passed without the concurrence of two-thirds at least of the officers present.

These statutes exhibit the anxiety of the Irish Parliament to give statutory effect to the Lord Lieutenant's proclamations, and to protect officers for acts done in the enforcement of martial law,

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while at the same time enforcing the responsibility of the Lord Lieutenant; and it appears from the reports in the State Trials that the Lord Lieutenant in each case personally confirmed the death sentence: see *Wolfe Tone's Case* (1) and *William Byrne's Case* (2).

Unlike the armed insurrections of the past, where the insurgents met the Crown forces in actual battle, the present insurrection consists exclusively of warfare of a guerilla character, the nature of which is explained by Sir Nevil Macready in the following words:—"The scheme of the said warfare does not entail fighting in distinctive uniforms, or in accordance with the laws of war, but under a system of guerilla attacks, in which inhabitants, apparently pursuing peaceful avocations, constantly come together and carry out guerilla operations, which often result in the death of or serious injuries to members of His Majesty's forces and police at the hands of the people who are posing as peaceful citizens." During the continuance of such a state of affairs as is described in Sir Nevil Macready's affidavit the Government is entitled and, indeed, bound to repel force by force, and thereby to put down the insurrection and restore public order. As was stated by Lord Halsbury in *Tilonko* v. *Attorney-General of Natal.* (3), "such acts of justice are justified by necessity by the fact of actual war, and that they are so justified under the circumstances is a fact that it is no longer necessary to insist upon, because it has been over and over again so decided by Courts as to whose authority there can be no doubt." It is unnecessary for us to discuss the cases to which Lord Halsbury refers, such as the *Case of Ship Money* (4); *R.* v. *Pinney* (5); *R.* v. *Stratton and others* (6); *R.* v. *Eyre* (7); *R.* v. *Nelson and Brand* (8), to which may be usefully added the reports of three Royal Commissions—"Fetherstone's Riots" (Parliamentary Papers, 1893, 1894, c. 7234); "Landing of Arms at Howth" (Parliamentary Papers, 1914, c.d. 7631); and "Re Sheehy-Skeffington" (Parliamentary Papers, 1916, c.d. 8376).

(1) 27 State Trials, 614, 623.
(2) 27 State Trials, 1078, 1123.
(3) [1907] A. C. 93, 95.
(4) 3 State Trials, 825. Holborne's Argument, at p. 976, and per Croke J., at p. 1162.
(5) 3 State Trials, N. S., at p. 2; 3 B. & Ad. 947.
(6) 21 State Trials, at p. 1230.
(7) (1868) Finlason's Report.
(8) Frederick Cockburn's Report.

It is also clear on the authorities that when martial law is imposed, and the necessity for it exists, or, in other words, while war is still raging, this Court has no jurisdiction to question any acts done by the military authorities (*Ex parte Marais* (1)), although after the war is over persons may be made liable, civilly and criminally, for any acts which they are proved to have done in excess of what was reasonably required by the necessities of the case: *Governor Wall's Case* (2); *Wright* v. *Fitzgerald* (3); *Rainsford* v. *Browne* (4); *Ex parte Milligan* (5)—unless these acts have in the meantime been covered by an Act of Indemnity.

As regards 3, could the military Court act, having regard to the fact that Courts of Justice in the area were open? This point was raised in a net form in *Wolfe Tone's Case* (6), but in consequence of his death was never decided. Wolfe Tone was charged with high treason, in that he, being a natural-born subject of the King, had traitorously entered into the service of the French Republic, then at open war with His Majesty, and had been taken bearing arms against his King and country. He was tried by Court-martial, acting under martial law, and was convicted and sentenced to death. On the morning fixed for his execution, Mr. Curran applied to this Court for a writ of habeas corpus on the ground that he had no commission under His Majesty, and that, therefore, no Court-martial could have cognizance of any crime imputed to him while the King's Bench sat in the capacity of the great criminal Court of the land. The Court granted the writ without argument, but, in consequence of the death of the prisoner, no return was ever made to it, and the question was, therefore, never discussed or decided. The Irish Parliament, however, in the following year, in the Act of 39 Geo. 3, c. 11, to which we have previously referred, removed any doubt that might have existed on the point by specially enacting that persons might be punished according to martial law, whether the ordinary Courts of Justice should or should not at such time be open.

(1) [1902] A. C. 109.
(2) 28 State Trials, 51.
(3) 27 State Trials, 759.
(4) 2 N. Ir. Jur. Repts. 179.
(5) 4 Wall, U. S. 2.
(6) 27 State Trials, 614.

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In 1838 the then Attorney-General and Solicitor-General, Sir John Campbell, afterwards Lord Campbell, and Sir R. M. Rolfe, afterwards Lord Cranworth, gave an opinion in reference to the state of unrest then prevailing in Canada to the effect that when the regular Courts were open so that criminals might be delivered over to them to be dealt with according to the ordinary law, there was not any right in the Crown to adopt any other course of proceedings (Forsyth's Cases and Opinions on Constitutional Law, p. 199). It may, however, be doubted whether they contemplated such a system of guerilla warfare as that now described.

The matter did not arise again for decision until the case of *Ex parte Marais* (1), where it was strenuously argued by Mr. Haldane that once it appeared that the ordinary course of law could be and was being maintained, a state of war did not exist, and martial law in that case could not be applied to civilians. The Board, however, which consisted of the Lord Chancellor, Lord Halsbury, Lord Macnaghten, Lord Shand, Lord Davy, Lord Robertson, Lord Lindley, and Sir Henry de Villiers, did not accept this view; and the Lord Chancellor, in giving judgment, laid it down in clear language that the fact that for some purposes some tribunals had been "permitted to pursue their ordinary course was not conclusive that war was not raging." This case has, no doubt, been criticized on the ground that some of the language employed in the judgment was too wide, but it is a clear authority for the net point it decides, and we must give effect to it.

As regards 4, could the military Courts impose a sentence of death? In considering any question arising out of the administration of martial law by military Courts, we must not lose sight of the fact that they are not, in strictness, Courts at all; but, as Mr. Justice Stephen says, "merely committees formed for the purpose of carrying into execution the discretionary powers assumed by the Government" ("History of Criminal Law," vol. i, p. 216); and their position could not be more accurately stated than it is by Lord Halsbury in *Tilonko* v. *The Attorney-General of Natal* (2), where he said: "If there is war, there is the

(1) [1902] A. C. 109.

(2) [1907] A. C. 93-95.

right to repel force by force; but it is found convenient and decorous, from time to time, to authorize what are called 'Courts,' to administer punishments, and to restrain, by acts of repression, the violence that is committed in time of war, instead of leaving such punishments and repression to the casual action of persons acting without sufficient consultation or without sufficient order or regularity in the procedure in which things alleged to have been done are proved. But to attempt to make these proceedings by so-called Courts-martial, administering summary justice under the supervision of a military commander, analogous to the regular proceedings of Courts of Justice is quite illusory."

The proceedings of a military Court derive their sole justification and authority from the existence of actual rebellion, and the duty of doing whatever may be necessary to quell it, and to restore peace and order. In this case the affidavit sworn by Sir Nevil Macready dates the rebellion back to the 1st of July last. Mr. Healy and Mr. Lynch, however, referred to the Restoration of Order in Ireland Act, 1920, which received the Royal assent on the 9th August, 1920, and to the Firearms Act, 1920, which received the Royal assent on the 16th August, 1920—a week later—and pointed out that by the regulations made under the former Act the severest penalty that could be imposed by a Court-martial for the keeping of firearms or ammunition was penal servitude; and, under the latter Act, a sentence of three months' imprisonment in England, or two years in Ireland—the penalty being obviously increased in Ireland in consequence of the state of the country. They consequently argued, with considerable force, that Parliament in the Restoration of Order in Ireland Act, 1920, and the Firearms Act, 1920, assumed that the penalties enacted by those Acts would be sufficient to cope with the state of disorder then existing; and which, according to the affidavit of Sir Nevil Macready, at that time, and for some time previously, had amounted to rebellion. To this it is answered that the danger grew and became more urgent, and culminated in the cruel and inhuman shooting down of the sixteen cadets near Macroom, which immediately preceded the issue of the proclamations of the 10th and 12th December, 1920; both, it is to be noted, made when Parliament was sitting. It

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was further argued that the infliction of a death sentence without statutory authority was abhorrent to the spirit of the constitution, and that it was obviously wrong that a special statutory Court-martial should sit, with limited capacity, to try one man for the improper possession of arms, and at the same place a military Court should sit to try another man for a similar offence, and should be capable of converting a minor offence into a capital crime, and even of depriving the accused of the legal safeguards which he would have had under the Restoration of Order in Ireland Act, sect. 2, sub-s. 1, if he had been charged before a Court-martial with a crime punishable by death. The objection, however, is one rather for the consideration of Parliament than for this Court, which cannot, durante bello, control the military authorities, or question any sentence imposed in the exercise of martial law; and it must be borne in mind that Sir Nevil Macready, in his affidavit, made, as we must assume, under a full sense of his official responsibility, swears that he considered and considers it absolutely essential in order to put an end to the terrible murders now so frequent, and for the suppression of the insurrection, that the unlawful carrying or possession of arms or other lethal weapons in the martial law area should be punishable by death.

It seems competent, if war exists, for the military authorities to use special military Court machinery, and to impose any sentence, even death, without being disabled, in another case, from applying procedure of a more moderate and limited character, or vice versa. When peace is restored, acts in excess of what necessity requires, as to which there are many cases, which will be found in the notes to *Mostyn* v. *Fabrigas* (1), may require the protection of indemnifying legislation, the principles of which are stated by Mr. Justice Willes in *Phillips* v. *Eyre* (2); but, while war is raging, as Sir Nevil Macready describes, this Court has no jurisdiction to interfere. There is no doubt that during the continuance of war a rebel guilty of treason may be slain in actual conflict or in fresh pursuit. Mr. Healy admits this, but contends that when a prisoner he must be tried as a civilian. Whatever may be the legal position of prisoners

(1) 1st Smith's Leading Cases, 662. (2) L. R. 6 Q. B. 16.

when the rebellion is quelled, it is quite clear that during the continuance of hostilities, and while martial law exists, the necessities of the situation are for the decision of the military authorities, and that they may either try the prisoner by military Court at once, or they may postpone the trial to a future date, which would usually be in the interests of the prisoner.

It is also, we think, clear that once peace is restored any prisoners in custody under sentence of a military Court, as distinct from a statutory Court-martial, would have to be discharged, unless in the meantime an Act was passed, such as the Indemnity Act, 1920 (10 & 11 Geo. 5, c. 48), which, by sect. 5, validates any sentence passed, judgment given, or order made by a military Court in connexion with the late war, with, however, a provision that any petition from a person upon whom the sentence has been passed by any such military Court shall be submitted to the Judge Advocate-General for his opinion and report, in like manner, and in the like cases, as if the sentence were a sentence passed by a Court-martial under the Army Act.

Giving full weight and anxious consideration to the powerful arguments which were addressed to us by Mr. Healy and Mr. Lynch, we have come to the conclusion that in this case we have no jurisdiction to interfere with the proceedings or sentence of the military Court, and that consequently we must refuse the application.

Solicitor for the accused: *Denis Boudren.*

Solicitor for the Crown: *The Chief Crown Solicitor.*

H. J. M'C.

[The Dublin Daily Press of 1st day of March, 1921, announced the fact of the execution of the sentence of death upon Joseph Allen (who, with others, was shot on the 28th day of February, 1921).—ED.]

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1920.
Nov. 8, 9, 18.
Appeal.
1921.
Jan. 21.
Feb. 7.

JOHN E. WELLWOOD *v.* ALEXANDER KING, Ltd.

Defendants (1).

(1919. No. 5092.)

Negligence—Collision between motor cars—Joint negligence of bailee and third party—Bailor's right to damages—Doctrine of identification.

A entrusted his motor car to C for repairs. The car was taken out by a servant of C for the purpose of testing its engines. It came into collision with a lorry belonging to B, driven by B's servant. In an action for damages brought by A against B, the jury found that the driver of the lorry had driven at an excessive speed, and that the driver of the motor car was negligent in not keeping a proper look-out. They also found that the driver of the lorry could not, by the exercise of reasonable care and caution, have avoided the consequences of the other driver's negligence. On these findings Gordon J. gave judgment for the plaintiff. This judgment was set aside by the King's Bench Division on the ground that the bailor was so far identified with the bailee as to disentitle him to recover damages in respect of injuries to the subject-matter of the bailment resulting from the joint negligence of the bailee and a third party.

Held (reversing the King's Bench Division and restoring the judgment of Gordon J.), that the doctrine of identification of bailor and bailee is not applicable in relation to liability for negligence.

Motion on behalf of the defendants that the judgment entered for the plaintiff be set aside, and judgment be entered for the defendants, or, in the alternative, that a new trial be ordered. There was a cross-motion on behalf of the plaintiff, if necessary, to have the finding in answer to one of the questions submitted to the jury set aside.

The action was brought to recover damages for injuries caused to plaintiff's motor car by the alleged negligence of the defendants' servant in driving and managing a motor lorry the property of the defendants.

(1) In the King's Bench Division, before Gibson, Pim, and Samuels JJ. In the Court of Appeal, before Sir James Campbell C., and Ronan and O'Connor L.JJ.

The defendants by their defence denied any negligence by themselves or their servants, or that it was by reason of any such negligence that the plaintiff's motor car was damaged. They also denied that the motor car was the property of the plaintiff, or that any expenses were incurred by him. (But the questions as to ownership and expense were not relied on at the trial.) Defendants also pleaded contributory negligence on the part of the plaintiff, his servants, or agents, and said that the injury to the car was caused solely by the negligence of the plaintiff, his servants, or agents.

At the trial the parties agreed that if a verdict should be found for the plaintiff, the damages should be assessed at £320. It appeared that the motor car had been handed over by the plaintiff to Messrs. Chambers for overhaul and repair; that an employee of Messrs. Chambers, named Montgomery, had taken out the car for the purpose of testing it; and that whilst being driven by him the collision with the defendants' motor lorry, driven by Whan, took place. It was not disputed that Montgomery was not a servant of the plaintiff, and the contention for the plaintiff was that he was not liable for any negligence of Montgomery, as he was not his servant. The action was tried before Gordon J. and a special jury of the City of Belfast on 26th July, 1920.

The questions submitted to the jury and the answers to them were as follows:—

1. Was the defendants' driver negligent (*a*) in driving at an excessive speed at the place and under the circumstances? Answer, "Yes." (*b*) In not keeping a sufficient look-out? Answer, "No." (*c*) In not sounding his horn or giving proper warning when approaching the end of the Stranmillis Road? Answer, "No." (*d*) In not applying his brakes in proper time? Answer, "No." (*e*) In not applying his brakes with reasonable care and skill? Answer, "No."

2. Was Montgomery negligent (*a*) in emerging from Stranmillis Road at too great a speed? Answer, "No." (*b*) In emerging on his wrong side? Answer, "No." (*c*) In not keeping a proper look-out at the place and under the circumstances? Answer, "Yes."

3. If Montgomery was negligent, could the driver of the lorry,

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by the exercise of reasonable care and caution, have avoided the accident? Answer, "No. If anything could be done to make the corner safe, we recommend to the City Council to do it."

The Judge gave judgment for the plaintiff for the said sum of £320 and costs, but directed a stay of execution until 16th October, 1920; and if in the meantime the defendants served notice to set aside the verdict and for a new trial, or that judgment be entered for defendants, a further stay till motion disposed of.

Serjeant Hanna K.C. and *T. J. Campbell K.C.* (with them *William Beattie*), for the defendants in support of the motion.

Andrews K.C. and *J. Whitaker K.C.* (with them *M'Kean*), contra.

The arguments in the King's Bench were similar to those in the Court of Appeal. *Rylands* v. *Fletcher* (1); *Black* v. *Christchurch Finance Company, Ltd.* (2); *Hardaker* v. *Idle District Council* (3); *Clements* v. *Tyrone County Council* (4) were also cited on behalf of the defendant.

Cur. adv. vult.

GIBSON J.:—

Though the defence treated Montgomery as the plaintiff's servant, it was at once at the trial admitted that he was not, and the controversy all through was whether Montgomery's contributory negligence, if any, was imputable to the plaintiff. The argument before us has been addressed to the following points:— 1. Was the contract with Chambers one which from its character would make the plaintiff responsible for negligence in its performance? 2. If it was not, can the contributory negligence of the servant of Chambers, an independent contractor, give the defendants a defence as against the plaintiff who employed Chambers? 3. If contributory negligence found in the second and third answers might entitle the defendants to a verdict on the questions and answers, was there evidence to support these answers? 4. Is the case one in which there should be a new trial, which would be the third? At the first trial before the Lord Chief

(1) L. R. 3 H. L. 330.
(2) [1894] A. C. 48.
(3) [1896] 1 Q. B. 335.
(4) [1905] 2 I. R. 415, 452.

Justice the jury disagreed, failing to answer any of the questions left to them. At the trial now under consideration, the plaintiff's counsel asked for a direction. The learned Judge, however, drafted questions which he thought appropriate if the plaintiff's view of law was erroneous, and there was no objection to them or to his charge, or to his explanation of the effect of the questions. Serjeant Hanna, for the defendants, asked for other questions, such as indicated in *Neenan* v. *Hosford* (1), but they need not be considered if on the present findings the defendants can have judgment.

1. On the first point, to which attention was mainly directed at the trial and before us, and on which my brother Gordon ruled against the defendant, in my opinion rightly, many authorities were cited for the defendants which I shall not examine in detail. They were successfully distinguished by Mr. Andrews as relating to use of land, or to public duty, or to matters and things dangerous in execution if extreme care was not exercised. The plaintiff handed over his car to Chambers to do what was necessary. If testing was required, the mode and place was for Chambers to decide. If he selected a crowded and unfit thoroughfare, or if his man was negligent, that could not affect his employer, the plaintiff. I see no evidence which would establish actionable liability against the plaintiff for default of Chambers, which would be merely collateral negligence, not flowing from the nature of the plaintiff's contract.

2. Assuming that no action or counter-claim against the plaintiff could have been supported by Montgomery's negligence, the plaintiff's counsel contend that, the relation of master and servant not existing between the plaintiff and Chambers, and there being no actionable liability on the plaintiff, the defendant cannot rely on Montgomery's contributory negligence, as no contributory negligence, however gross, of the contractor can, it is said, touch the plaintiff, for which proposition counsel cited *The Bernina* (2). The Judge accepted this proposition, and, notwithstanding the findings, entered judgment for the plaintiff. If the law was as supposed, no example of the kind at Common Law has been cited by counsel, and it would lead to some strange

(1) [1920] 2 I. R. 282. (2) 13 App. C. 1.

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and inconvenient results, of which illustrations were suggested during the argument: such as a country gentleman getting on loan for the season from a distant friend his horse and carriage, and the borrower's driver by contributory negligence causing injury; or a racehorse trainer receiving a horse and injuring it by contributory negligence of his groom by running into another owner's horse in his own ground or elsewhere. In either of such cases, would a third party who had been guilty of negligence be deprived of the protection of the contributory negligence which would have been a complete defence against the borrower or horse-trainer? The case is one of bailor and bailee at Common Law. The bailor can sue the bailee if by his negligence he has caused damage to the property bailed. If the third party has caused the injury, the bailee, being in possession, can recover as if owner damages according to the value of the article destroyed or injured, and such damages will be held by him, in part at least, for the benefit of the bailor: *The Winkfield Case* (1). Such action could not succeed if the plaintiff bailee was guilty of direct contributory negligence. Can it be (as the plaintiff's argument demands) that the bailee, having been defeated on that ground, the bailor, as being free from that defence, could bring a new action? What if the bailor recovered judgment against the negligent third party, unprotected as by the hypothesis he would be by the bailee's fault, could such third party in turn make the bailee responsible? and what damages could he get? In early law the right of action was confined to the bailee where the chattel in his possession was taken or injured, but later the bailor also was allowed to sue.

In *Nicolls* v. *Bastard* (2) Parke B. thought that whichever, bailor or bailee, first obtained damages, that would be a full satisfaction. This would be true as to the bailee's action, but might not apply to the bailor's action, to the full extent, as the bailee might have suffered individual special damage over and above the capital value of the chattels taken, destroyed, or injured. The claim of the bailor against his bailee for fault causing loss rests on contract, or on tort arising from contract: a third party, who knows nothing of the true ownership, is free from any contractual or quasi-contractual obligation. The plaintiff's

(1) [1902] P. D. 42.

(2) 2 C. M. & R. 660.

proposition that such third party cannot defend himself by proving that the bailee was really to blame would impose on such party much the same responsibility as attaches to the bailee. It appears to me that on principle, as well as from the necessities of common life, a bailor who has handed over a chattel to the complete control of his bailee cannot found an action on an injury caused by the latter, though he could not be attacked by a third party for such causal negligence. Take such a case as *Butterly's* (1), and suppose that the present defendants' negligence was of that type, could the plaintiff have escaped from the consequences of Montgomery's direct contributory negligence in running into the heap of stones? *The Winkfield* (2), since applied in several Irish cases, having decided that the bailee can sue as if true owner, the damages recovered being wholly or in part payable by him to the owner, it appears impossible to dissociate such owner from the bailee. The bailor, whose primary right is against his contracting bailee, cannot be allowed to pass him by and put the blame on the third party as if subject to the same responsibility. I have not found in any text-book or report anything which would warrant the proposition that a bailor in an action brought by him is not affected by direct negligence of his bailee, who is entitled to be treated as owner for the purpose of recovering full damages. *The Bernina* (3), relied upon by the plaintiff, is not applicable to the present controversy. It was decided on Admiralty law, not the same as that governing the relation of bailor and bailee: Lindley L.J. (4). In a collision between ships special rules as to navigation and statutory provisions have to be considered in deciding which vessel is in fault, or whether both are to blame. A curious example is *Boucher's Case* (5). In *The Bernina* (3) the vessels were found to be in joint fault; but the Judge of first instance followed *Thorogood* v. *Bryan* (6), in doing which it was decided that he was wrong, passengers not being identified with their ship. The case is not an authority that wherever one vessel is guilty of some negligence it must in Admiralty practice or law be regarded as involved in

(1) [1907] 2 I. R. 134.
(2) [1902] P. D. 42.
(3) 13 App. C. 1.
(4) 12 P. D. 91.
(5) [1904] 2 I. R. 129.
(6) 8 C. B. 115.

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joint fault, notwithstanding that the other vessel could and should have avoided the collision. In such case the latter would be deemed exclusively in fault. The classification of cases in Lindley L.J's judgment (1) shows this: he points out a plaintiff is just as much under a duty to avoid injury from a defendant's negligence as a defendant is to avoid injury from a plaintiff's negligence—a view adopted by the Lord Chancellor in *Neenan* v. *Hosford* (2). Take such a case as *Butterly's* (3), where a plaintiff carelessly drove up against a heap of stones left negligently on a road; and substitute a vessel negligently anchored in the fair way, and another vessel, which could and should have kept clear, running it down. Might not the moving ship be regarded as exclusively in fault? If ships under charter were in collision, occasioned by the fault of one or both of the crews of the charterers, the owners could not sue as if not to blame. The relation is, as Hill J. recently held, that of bailor and bailee; it is quite unlike *The Bernina* (4). The problem always is, what was the direct or real and effective cause of what has happened? The words "cause," "caused," and "occasioned" used in statutes as well as in judicial proceedings may be ambiguous; but our language supplies no substitute; the ambiguity must be removed by an appropriate adjective, or by oral explanation. In *Becker, Gray, & Co.'s Case* (5) Lord Sumner selects "direct" as the best defining term; in *The Leyland Shipping Co.* (6) Lord Shaw adopts "real efficient." His observations, at pp. 368–369, as to proximity in time not being decisive, are important, and may possibly be an objection to the words "proxima" and "ultima," as being themselves calculated to produce a false impression. Sir F. Pollock suggests "decisive" as the best explanatory term. The conception is clear enough; the difficulty is in expressing it when dealing with the multitudinous varieties of concrete cases. In applying the principle, Judges of eminence in Common Law and Admiralty Courts alike have arrived at conflicting conclusions on the same facts. I am not sure that causa causans and causa sine qua non, once in common use, are

(1) 12 P. D., at p. 89.
(2) [1920] 2 I. R., at p. 282.
(3) [1907] 2 I. R. 134.
(4) 13 App. C. 1.
(5) [1918] A. C., at p. 114.
(6) [1918] A. C., at p. 370.

not as good a limiting formula as any. No matter what form of speech is used, judicial explanation, applicable to the particular facts, must be given.

I am of opinion the defence of contributory negligence, good against Chambers, is valid against the plaintiff.

3. Next, on that view, are the defendants entitled to judgment on the findings? The jury held the defendants negligent as to excessive speed. There was no separate question asked to be put as to causation, just as in *Slattery's Case* (1); according to my recollection, the Lord Chief Baron left no such question, it being assumed that the negligence would have been directly causal if there was no direct causal contributory negligence. The defendants were acquitted of negligence as regarded sounding the horn. Montgomery was found guilty of negligence in one respect only—not keeping a proper look-out at the place and in the circumstances; the consequences which the defendants could not by reasonable care have avoided must mean causal consequences.

The plaintiff made no objection to the questions as unsuitable to dispose of the issue, nor was there any objection to the Judge's instruction and comment on the evidence. He must have explained to the jury the scope of the questions on the concrete facts and their effect on the result. I must interpret the answers as attributing direct causal fault to Montgomery.

The scene of the occurrence was Malone Road, a busy thoroughfare, on which the defendants' heavily loaded lorry, coming from Belfast at dangerous speed, was zig-zagging, as Miss Chambers describes, some 120 yards before reaching the place of the accident. The road was on a down gradient, and was greasy. The Stranmillis cross-road was also at the place on a down gradient. The carriageable space of the Malone Road was 29 feet, and there was at the Stranmillis side of the road a footpath about 5 or 6 feet wide. There was a high hedge on the right side of the Stranmillis Road which would intercept vision till the footpath space was reached. This made extra care on the part of Montgomery essential. He did not notice or attend to the horn, which apparently the jury considered was properly sounded. The defendants say that he took a dangerous risk in crossing in

(1) I. R. 10 C. L. 256.

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front of the lorry rushing along the greasy road in front. The plaintiff alleges that he would have been safe if the defendants had not tried to stop by putting on the brakes, which, owing to the state of the highway, caused the lorry to skid. The defendants rejoin that applying the brake was a precaution made reasonable by Montgomery attempting to cut across in front, and in a peril occasioned by the driver of the car, the plaintiff cannot, even if there was an error of judgment on the part of Whan, escape the imputation of causal blame. The car was going slowly; the driver's seat was about on a line with the hedge (Phillips) when the lorry, then zig-zagging some 30 yards away, was first seen, going, according to Montgomery, 18 or 20 miles an hour. The car could have stopped in 2, 3, or 4 feet; but instead of staying where he was, where he would have been safe, with the interval of footpath space between himself and the road, Montgomery tried to cross at accelerated speed of 10 miles an hour; he would have been successful (he says) if the lorry had continued its course without attempting to halt. Montgomery saw that the lorry zig-zagged, as he thought, from the action of the foot-brake. Miss Chambers had seen it skidding 120 yards away. He attributes the collision to Whan putting on the hand-brake when he was not able to control the lorry otherwise. He said that Whan wanted to stop, but could not. Why did he go on? His complaint is that Whan should not have stopped at all. According to Whan the car came out suddenly, and was only eight yards off when first observed. It would have taken two lengths of the lorry to pull up. But for putting on the brakes the lorry would, it is said, have gone through the car. Whan alleges that, first seeing the car a few yards off, he had to act on the instant.

On the above evidence the jury might well have found that the disaster was directly caused by the joint fault of car and lorry, but it would be for them to say whether Montgomery's act in hurrying across in front of a lorry noisily thundering along, visibly not under brake control, and zig-zagging on the slippery road, was not primarily and exclusively to blame. Even if Whan erred in applying the brakes, as he did—put, as he was, in a difficulty by Montgomery's sudden appearance—that would not absolve Montgomery, who had forced the hasty choice of

expedients. If he had attended to the horn which was sounded, he should, coming from a side road, have stopped till he saw the way was clear; but, being in motion and in order not to lose time, he hurried on, gambling on hazardous possibilities. Had the jury found that Montgomery was negligent in not arresting his movement, and that Whan could not by reasonable care have averted the misfortune, that would have been an obvious verdict for defendants. The Judge, however, did not put the issue in that shape, though he probably interpreted it in much the same sense. Neither at the trial nor before us was any argument directed to the form of the question, counsel applying themselves to establish that the lorry could not have been seen till the hedge-line was reached; that to be safe the car had to move on fast; that the accident was caused by the sudden and unexpected application of brake-power which failed to act properly. But if sight was obstructed by the hedge, hearing was not. Had Montgomery, coming from a side road to a corner admittedly dangerous, attended to the horn sounded, he should and would have stopped his car till the road in front was clear. When he first observed the lorry he was in a safe position, as the footpath space lay between him and the road. Seeing the lorry with erratic movements on the greasy road apparently not under control, he failed to note and take into account and appreciation the dangers of the critical situation. He cannot excuse himself (so the jury have found as I understood their answer) by a series of "ifs"—if the lorry had gone on straight at unabated speed, or if the brake had acted without producing skid. In a choice of risks Whan may have made in the emergency a mistaken selection, but the emergency and error were the result of the dart forward made by Montgomery. Without expressing any opinion of my own, I think there were materials on which the jury might find that the direct cause of the unfortunate result was the negligent conduct of Montgomery. If the jury accepted Whan's statement that the car only became visible some eight yards away then in motion, he was by this sudden and unexpected danger plunged into a situation of extreme difficulty. Side-road traffic should normally give way to main-road vehicles; and Whan might assume that, having sounded his horn, he would not be subjected to flank attack. As I

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read the answers, they would seem to me to entitle the defendants to judgment.

4. Though my conclusion on the facts is arrived at with some doubt (for other views might well have been taken), and though I should have preferred a specific question as to stopping, or one on the lines suggested by Sir James Campbell, I think that, having regard to the course of the trial and the absence of objection on the plaintiff's part to the questions in form or substance or to the charge, the action should not be sent to a third trial. The main debate at the trial and also before this Court was as to the legal consequences flowing from the relation between the parties, as to which I have stated my conclusion. If the bailor enjoys the fruits of victory won by the bailee's successful action, he must equally treat defeat as decisive against him where such defeat is occasioned by the bailee's direct contributory negligence; for the loss, destruction, or injury of, or to, the chattel committed to the bailee's control, he is answerable to his bailor, but the negligent third party is acquitted of direct causal blame. The situation is not altered by the bailor suing first or in place of the bailee.

Judgment must be entered for the defendants.

PIM J.:—

I agree with the view of the law which Mr. Justice Gordon took in this case. It seems to me clear that the owner of the car cannot be held liable for any injury done to an outsider by the driver of the car while it was wholly under the control of the driver's master—an independent contractor. A great number of cases on the subject have been cited to us by counsel on both sides. It is unnecessary to go into them. The question is, do the consequences which Mr. Justice Gordon has held to flow from his correct view of the law, in fact flow from it? Acting on his view of such consequences, the learned Judge entered a verdict for the plaintiff. If he is right, the following curious results ensue. If the independent contractor had brought the action, there would be a clean verdict for the defendant; and, if the law were otherwise and the plaintiff were liable, again there would be a clean verdict for the defendant. But because the plaintiff is not liable for any

damages which his car may have done, the defendant is to be held liable, although the jury find that he is guiltless. Such a result seems grotesque, and it is hard to imagine it can be the law, nor do I think it is.

Mr. Andrews and Mr. Whitaker have argued that, if the defendant be jointly guilty of the negligence which helped to cause the accident, then he is liable to the plaintiff. That statement must be admitted, for it is so decided in *The Bernina* (1), but it does not advance the matter very far. The determination of the question whether the defendant has been guilty of negligence which caused or helped to cause the accident in whole or in part cannot be ascertained without an inquiry into all the circumstances of the occurrence. To give evidence that the defendant was travelling too fast, and to take a verdict from the jury that he was guilty of that particular negligence, is not, and cannot be enough, for it might not have been the negligence which caused the accident, and there could be no finding of joint negligence as in *Armstrong* v. *the Lancashire and Yorkshire Railway Company* (2), *The Bernina* (1). The learned Judge's action in entering judgment for the plaintiff is tantamount to saying that neither the third nor fourth question was relevant, or ought to have been asked, and that the finding of an affirmative answer to the first question was enough to give the plaintiff a verdict. But the effect of the whole verdict is not to find that the defendant was guilty of negligence which caused or contributed to the accident, but, on the contrary, to find that he was not; for a finding that the defendant could not by any action of his have avoided the consequence of the plaintiff's negligence is a finding that the defendant's negligence did not contribute to the accident. See *Davy* v. *London and South-Western Railway Co.* (3). The result is that the jury have exonerated the defendant from all guilt, and yet the plaintiff is to get a judgment as if the defendant were guilty. The mistake made by the learned Judge is, I think, contained in the assumption that the plaintiff could separate himself completely from the controller and driver of the car, and thus obtain a one-sided verdict. Apart from the question of the relationship between bailor and bailee, and the law touching that relationship,

(1) 13 App. C. 1. (2) L. R. 10 Ex. 47. (3) 12 Q. B. D. 70.

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concerning which I agree with the views put forward by my brother Gibson, I think there is another ground for this opinion. The plaintiff relied on the evidence of the persons under whose control the car was. In doing so he submitted himself to the investigation of all the facts to which they could depose, and, if the facts show that they were guilty of the ultimate negligence, or negative any joint negligence on the part of the defendant, he cannot be allowed to shut it out; otherwise justice could not be done. The jury have found that the driver of the car was guilty of the essential and ultimate negligence which caused the accident. They may be right or wrong in that, but they are the judges.

The finding of the jury should stand.

SAMUELS J.:—

In my opinion the findings of the jury upon the questions submitted to them by the learned Judge supply all the materials necessary for finally determining the matters in dispute, and we are in a position to enter judgment upon these findings. My brother Gibson J. has very thoroughly analyzed the evidence, and it is unnecessary for me to add anything to his review of it. I think there was evidence to support the verdict, and that a third trial of this action should not be granted.

This action is brought by the bailor of a chattel—a motor car—against a defendant who is alleged to have injured it when under the control of the bailee's foreman, who was necessarily testing its running power after repairs executed by the bailee. The jury has found that both the defendants' driver and the bailee's foreman were guilty of negligence, but that the defendant's driver could not by the exercise of reasonable care and caution have avoided the consequence of the negligence of the bailee's foreman. If the action had been brought by Chambers & Co., the bailees, against King, Ltd., the defendants, this finding would have been a verdict for the defendants, and they would have been entitled to judgment.

At the trial Mr. Andrews K.C., for the plaintiff Wellwood, objected to the question of contributory negligence on the part of the driver of the motor car being left to the jury, on the ground

that Montgomery, the driver, was admittedly not in the employment of the plaintiff, but was the servant of Chambers & Co., and that the plaintiff was not legally responsible for his negligence (if any) in driving the car. The learned Judge left the question to the jury, and, in my opinion, he was right in doing so; but, notwithstanding the finding that Montgomery was guilty of contributory negligence, he gave judgment for the plaintiff for £320—the agreed amount of damages—yielding to the contention of counsel for the plaintiff that the plaintiff was not liable for any negligence of Messrs. Chambers's foreman, Montgomery, and that, as the defendants' driver had been found guilty of negligence in driving the lorry at an excessive speed, the plaintiff, being injured without any fault of his own, was entitled to recover.

If this action, brought as it is by Mr. Wellwood, the owner and bailor of the car, comes within the principle of the decisions in *The Bernina* (1), *Devlin* v. *Belfast Corporation* (2), and *Lynam* v. *Dublin United Tramways Co., Ltd.* (3), as is contended by the plaintiff Wellwood, he would be entitled to judgment on the ground that the question of contributory negligence would be immaterial as against him, as he would be (if the contention is correct) in the position of a third party—a stranger unconnected with the driving and management of the motor car when it was injured by the lorry. But is the bailor of a motor car, which while under the control of the bailee and being used for the purposes of the bailment is injured by a collision between it and another vehicle, so unconnected with the management of the motor car by the bailee that he can recover against the third party notwithstanding the contributory negligence of the bailee in bringing about the accident? Is the relation between the bailor of the chattel and the bailee, when the latter is acting within the scope of his obligations as bailee, but is negligent in the user of the subject-matter of the bailment, an altogether independent one in its legal aspect, like that of a passenger in a vessel, or tramcar, or hired conveyance, over which he has no control, if an accident occurs? In my opinion it is not.

(1) 12 P. D. 58; 13 A. C. 1. (2) [1907] 2 I. R. 437.
(3) [1919] 2 I. R. 445.

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There is no doubt that either the bailee or the bailor can bring an action for injury to a chattel bailed. Messrs. Chambers could have sued King & Co. They had been employed by Wellwood to repair and test the motor car. They were in possession of it as bailees for reward; the trial trip, during which the accident occurred, was a necessary incident of their employment as such bailees. If Messrs. Chambers had brought the action, the plea of contributory negligence would undoubtedly have been open for Messrs. King as against them, and if established King would have succeeded in the action as against Chambers. On the other hand, if Messrs. Chambers having brought the action had recovered damages, they would be trustees for the bailor Wellwood for all such portion of those damages as were not attributable to their own firm's particular loss, and no further action could be proceeded with against King by the bailor Wellwood. "As between bailee and a stranger possession gives title: that is not a limited interest, but absolute and complete ownership; and he is entitled to receive back a complete equivalent for the whole loss or deterioration of the thing itself. As between bailor and bailee the real interest of both must be inquired into; and as the bailee has to account for the thing bailed, so he must account for that which has become its equivalent and now represents it. What he has received above his own interest he has received to the use of the bailor. The wrong-doer having once paid full damages to the bailee has an answer to any action by the bailor": per Collins M.R., delivering the judgment of the Court of Appeal: *The Winkfield* (1); see also *Worthington* v. *Tipperary County Council* (2). So also, if the bailor sues and recovers damages, the wrong-doer is absolved from further action by the bailee. This has been the law from ancient times. To quote Chief Justice Holmes's authoritative work on the Common Law: "The bailor also obtained a right of action against the wrong-doer at a pretty early date. It is laid down by counsel in Y. B. (3) in an action of trespass by an agister of cattle that 'in this case he who has the property may have a writ of trespass, and he who has the custody another writ

(1) [1902] Prob. 42, at p. 60. (2) [1920] 2 I. R. 233.
(3) 48 Edw. 3, 20 pl. 8.

of trespass.' Persay: 'Sir, it is true.' But he who recovers first shall oust the other of the action, and so it shall be in many cases; or, if tenant by elegit is ousted, each shall have the assize; and, if the one recover first, the writ of the other is abated, and so here." See Holmes's Lectures on Common Law, p. 171. So also in *Nicolls* v. *Bastard* (1). Parke B. stated there is no doubt the bailor may sue as well as the bailee, and "whichever first obtains damages it is a full satisfaction."

In a practical point of view the action by the bailee is an action on behalf of the bailor, as the damages recovered from the wrongdoer are the full damages for the injury and enure to his benefit. The damages that the bailor would recover if he sued would also be the full damages, and no further action could be brought by the bailee. It would be not only an anomaly but an injustice if the defendant could plead contributory negligence by the bailee if the bailee were plaintiff, but could not do so if the bailor were plaintiff; and that his liability to be amerced for the same injury to the same chattel in damages enuring for the benefit of the same person were to depend upon the quiddity whether the bailor or bailee was the first litigant. The right to sue by a bailee for injury to a chattel depends upon possession, and that of the bailor upon ownership; but these incidents of proprietorship and possession in respect of the same chattel by two persons seem to me to be essentially different when viewed in relation to actions for damage to the subject of the bailment from those which are involved in actions by an individual for negligence causing injury to his person or to his property not the subject of a bailment such as this. In this latter class of cases persons implicated as tort-feasors cannot rely on the contributory negligence of a co-defendant or other person as an answer to a plaintiff not guilty himself of any default who has been injured by the combined effect of the negligence of two persons, of whom the one is not responsible for the faults of the other. The plaintiff can reply, "A plague on both your houses"; but, in my opinion, if a bailor sues for injury to the subject of a bailment, the defendant is entitled to plead that the damage was caused by the contributory negligence of the bailee in the

(1) 2 C. M. R. 660.

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management of the chattel bailed; and if he succeeds in this plea it is an answer to the bailor's action, just as it would have been to an action by the bailee. Lord Lindley, in criticizing *Thorogood* v. *Bryan* (1) and the series of cases upon actions for negligence reviewed by him in his judgment in *The Bernina* (2), says, at p. 91: "Nor is the relation between bailor and bailee an element in the class of cases now under consideration; and to decide this case on principles applicable to bailments of goods would be to proceed on a misleading analogy." Conversely, I consider that to decide this case, which involves the relation of bailor and bailee, on the principles applicable to actions for negligence where no such relation exists would be to proceed upon a false analogy.

In my opinion, the question of contributory negligence by the driver of the motor car was properly left to the jury; and as the verdict on this issue was in favour of the defendant, he is entitled to have judgment entered, dismissing the action, and the judgment of the learned Judge awarding the £320 damages to the plaintiff should be set aside.

J. B. B.

1921.

Jan. 21.

The plaintiff appealed to the Court of Appeal.

Andrews K.C., J. M. Whitaker K.C. (with them *T. W. Brown K.C.* and *M'Kean*):—

The King's Bench Division seems to have set up again the doctrine of identification which was set aside in *The Bernina* (2). Discussing the law applicable to a transaction in which a plaintiff has been injured by negligence, and in the course of which transaction there have been negligent acts or omissions by more than one person, Lord Esher M.R., at page 61, gives an illuminating analysis, with eight examples, embracing practically every conceivable point. He quotes with approval *Quarman* v. *Burnett* (3), which laid down that a defendant is only liable for the negligence of those who have the relation of servants to him as master; upon the principle that qui facit per alium facit per se

(1) 8 C. B. 115. (2) 12 P. D. 58; 13 A. C. 1. (3) 6 M. & W. 499.

the master is responsible for the acts of his servant; also *Reedie* v. *London and North-Western Railway Company* (1), in which it was held that the liability of anyone other than the party actually guilty of any wrongful act proceeds on the maxim qui facit per alium facit per se, "but neither the principle of the rule nor the rule itself can apply to a case where the party sought to be charged does not stand in the character of employer to the party by whose negligent act the injury has been occasioned." Lord Esher adds: "So stands the Common Law as to the rights and liabilities of a plaintiff in such actions, unless the case of *Thorogood* v. *Bryan* (2) is to be supported, by which, although the liabilities of such a plaintiff are not said to be increased, it is said that his rights are diminished."

In this case the King's Bench say that as the servant of the bailee, engaged in driving the bailor's or plaintiff's car, was guilty of negligence, the bailor is identified with that servant's negligence. We submit that the plaintiff stands in an independent relation both to the bailee and to third parties. A cannot be held liable for the negligence of B except on the principle qui facit per alium facit per se, and to come within this principle there must be either direct agency or the relation of master and servant. *Thorogood* v. *Bryan* (2), the only authority upon which the judgment of the King's Bench Division could be supported, was overruled by *The Bernina* (3), both in the Court of Appeal and in the House of Lords.

Littledale J. states the principle applicable to this case in *Laugher* v. *Pointer* (4) in the following passage:—"Suppose a man has a ship or a carriage or other thing to repair, and he, instead of having the repairs done on his own premises and by his own servants, sends it out to be repaired by a person who exercises the public employment under which it would be repaired, and any damage happens in the course of the repair by the negligence of the persons employed; these are employed by a person who may be considered the agent of the principal, and yet the law would not hold the principal liable." In *Quarman* v. *Burnett* (5) Parke B., having laid down the principle upon which

(1) 4 Ex. 244.
(2) 8 C. B. 115.
(3) 12 P. D. 58; 13 A. C. 1.
(4) 5 B. & C. 547, at p. 557.
(5) 6 M. & W. 499.

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a master is responsible for the acts of his servant, and stated that the liability by virtue of the principle of relation of master and servant must cease when the relation itself ceases to exist, goes on to say that "a third person entering into a contract with the master which does not create the relation of master and servant at all is not thereby rendered liable; and to make such person liable recourse must be had to a different and more extended principle, namely, that a person is liable not only for the acts of his own servants, but for any injury which arises by the act of another person in carrying into execution that which that other person has contracted to do for his benefit." The "extended principle" referred to by Parke B. has been applied by the King's Bench Division in this case.

The Milan (1) is an identical case. There it was held that the negligent navigation of a carrying vessel is not in law the negligence of the owner of the cargo carried, if he is not the owner of the ship. Dr. Lushington says in his judgment at pp. 402–3: "The owner of the cargo does not, it seems to me, commit any negligence contributing to the loss, certainly not by himself personally, certainly not by his agents, for the master and crew are in no respect under his control . . . I cannot conceive a responsibility for an act done where the individual has not, either by himself or his agent, any power of interference or control."

Serjeant Hanna and *T. J. Campbell K.C.* (with them *Beattie*), for the respondents:—

Either the bailor or the bailee is entitled to recover if injuries to the subject-matter of the bailment are caused by the negligence of a third party while the article bailed is in the possession of the bailee, and used by him for the purpose of the bailment. Both cannot recover: *Nicolls* v. *Bastard* (2).

Whichever recovers first, the sum awarded to him is a full satisfaction of the whole loss or damage, and the other cannot bring a second action in respect of the same loss or damage. Where a bailee recovers damages, he holds compensation awarded to him beyond his own particular loss in trust for his bailor. If the bailee had been the plaintiff here, the answers given by the

(1) Lush. 388. (2) 2 C. M. & R. 659.

jury would have amounted to a clean verdict for the defendants. A bailor is in no better position than a master or principal. Was the liability of the defendants for the same acts and the same injuries in the same transaction to be different according as the bailor or the bailee happened to be the plaintiff? The bailor entrusted the motor car to the bailee, and authorised him to test it on the highway as well as to do the repairs. If the bailee had sued and failed to recover, would the defendants have then been open to an action by the bailor?

In *Coggs* v. *Bernard* (1) Lord Holt C.J., referring to this sort of bailment, uses indifferently the terms "bailor" and "master," and "bailee" and "servant," and says: "But yet this servant is not a domestic servant, nor under his master's immediate care. But the true reason of the case is, it would be unreasonable to charge him with a trust further than the nature of the thing puts it in his power to perform it."

The speeches in the House of Lords in *The Bernina* (2) did not lay down any general proposition. All the observations of the Lords were limited to public vehicles carrying passengers. In *Vanderplank* v. *Miller* (3) it was held that in an action for running down a vessel the plaintiff could not recover unless the injury was attributable entirely to the fault of the defendants; if he were partly in fault, but the defendants with care might have prevented the accident, he could not maintain the action. Lord Bramwell says this case was "plain enough": *The Bernina* (4). In the judgments in the latter case in the Court of Appeal (5), Lindley L.J. says:—"Nor is the relation between bailor and bailee an element in the class of cases now under consideration, and to decide this case on principles applicable to bailments of goods would be to proceed on a misleading analogy."

In *The Winkfield* (6), Collins M.R. says:—"The wrongdoer who is not defending under the title of the bailor is quite unconcerned with what the rights are between the bailor and bailee, and must treat the possessor as the owner of the goods for all purposes quite irrespective of the rights and obligations as between

(1) 2 Ld. Raymond, 909.
(2) 13 A. C. 1.
(3) Moo. & M. 169.
(4) 13 A. C., at p. 15.
(5) 12 P. D., at p. 91.
(6) [1902] P. 42, at pp. 54–5.

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him and the bailor." The plaintiff here has identified himself with the bailor, and has sought to establish that the defendants' negligence caused the accident, but the jury's finding negatives this submission.

Apart from the relation of bailor and bailee, the operation of testing the motor car on the highway was likely to be dangerous to the public unless precautions were taken; and the plaintiff could not delegate the duty of taking precautions. The negligence of Chambers's servant was not casual or collateral to his employment by the plaintiff: *Penny* v. *Wimbledon Urban District Council* (1); *The Snark* (2).

On the findings of the jury the defendants are entitled to judgment irrespective of the relation between the plaintiff and Chambers. The findings exonerated the defendants' servant from blame, inasmuch as he was held not to have been the sole cause of the accident. If the questions put to, and the answers of, the jury did not try the case, the formula in *Neenan* v. *Hosford* (3) would have done so.

Whitaker K.C., in reply:—

The argument on the other side comes to this: the wrongful act of A is at one and the same time the act and not the act of B. It is B's act to deprive him of his rights; it is not B's act to impose liabilities.

The doctrine of imputed negligence applies only where the relation of master and servant or that of principal and agent exists. The doctrine of identification, upon which this case was decided by the King's Bench Division, was shattered by *The Bernina* (4). Lord Herschell was unable to comprehend the doctrine of identification, upon which the Judges had laid so much stress in *Thorogood* v. *Bryan* (5). Apart from cases of master and servant and principal and agent, the doctrine has not been applied in negligence actions since 1888.

Cur. adv. vult.

(1) [1899] 2 Q. B. 72.
(2) [1900] P. 105.
(3) [1920] 2 I. R. 258.
(4) 12 P. D. 58; 13 A. C. 1.
(5) 8 C. B. 115.

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SIR JAMES CAMPBELL C. :—

This action has arisen as the result of a collision between a motor car, when emerging from a side road, and a motor lorry, travelling along the main thoroughfare leading from Malone, an important residential suburb, to the City of Belfast. The defence was a denial of negligence, a plea of contributory negligence, and a plea that the injury was caused solely by the negligence of the plaintiff. The plaintiff was the owner of the motor car, for the injuries to which the action was brought, but for some time before, and on the day of the collision, it had been in the possession of a Mr. Chambers, a motor engineer, of Belfast, to whom it had been sent for repair. At the time of the collision it was in charge of Montgomery, a foreman engine-fitter in the employment of Chambers, who had taken it out for the purpose of testing its engine before it was returned to the owner; while the lorry was being driven by a servant named Whan, in the employment of the defendants. The negligence relied upon by each side as against the other fell under different heads, each of which was submitted as a separate issue to the jury. I need not enumerate them, as it is sufficient to say that, as against Whan, the driver of the lorry, the jury negatived all save the following: "In driving at an excessive speed at the place and under the circumstances"; while in the case of Montgomery, the driver of the motor car, they found he was negligent "in not keeping a proper look-out at the place and under the circumstances"; while they also found that the driver of the defendants' lorry could not by the exercise of reasonable care and caution have avoided the consequences of Montgomery's negligence. Notwithstanding these findings (upon which, in an ordinary case, where the contributory negligence so found was that of the plaintiff or his servant, the defendant would have been entitled to verdict and judgment), Gordon J. gave judgment for the plaintiff for £320, the agreed measure of damages.

This judgment has been set aside as the result of a unanimous decision in the King's Bench Division, and judgment entered for the defendants, upon a view of the law which to me is novel, and, if correct, must have startling and far-reaching results; but I am

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satisfied that it has neither foundation in fact nor any authority to support it. They have found that the relation existing between plaintiff and Chambers in respect of the motor car was that of bailor and bailee, and have rejected the suggestion made on behalf of the defendants, that the position of Chambers was that of an independent contractor. So far, I think, they were clearly right; but where they have been radically wrong, in my opinion, is in holding that a bailor is so far identified with the bailee as to be deprived of any right to recover damages in respect of injuries to the subject-matter of the bailment in any case in which these injuries have been the result of the joint negligence of the bailee and a third party. Indeed, as I understand the judgments, they go much further, and decide that the bailor is disentitled to recover either for injuries to person or property, where such injuries are solely the result of incompetence, misconduct, or negligence on the part of the bailee or his servants while in charge of the article bailed; or, to take a concrete case, they have held that if upon this particular occasion the plaintiff himself had been lawfully upon the Malone Road, at the time when Montgomery emerged from the Stranmillis Road, and had as the result of Montgomery's negligent driving been injured or killed, neither he nor his dependants could recover from Chambers if the vehicle that was being driven was the plaintiff's property, though for the time it was out of his custody or control. They have, it is true, stopped short of deciding that if a third person, in no relation to plaintiff or Chambers, was injured in this way, he could sue the plaintiff in an action for damages. Yet it seems to me that this would be the necessary and logical conclusion of this strange doctrine of identification between a bailor and bailee; and that it cannot be refuted by the simple assertion of Gibson J., when he says, "though the bailor cannot be attacked by a third party for such causal negligence." I do not know what significance, if any, he attached to this word "causal," though he was plainly referring to such negligence as the bailee's servant was found by the jury to have been guilty of in the present case; but I am wholly at a loss to understand why if the bailor is to be debarred from remedy for injury to person or property resulting from the negligence of the bailee or his

servants while in the custody and control of the article bailed, on the ground of his identification for this purpose with the bailee, the same principle should not apply to make him liable to third parties for injuries received by them under the same conditions.

The Judges in the King's Bench Division seem to have held that it would be a strange anomaly if the defendants should be free from liability at the suit of Chambers or his driver, and yet be responsible for the same negligence to the plaintiff. They seem to have overlooked the fact that the plaintiff's right in this respect is precisely the same, and governed by the same law, as in the case of all other members of the public. In truth, this is an attempt to resurrect the doctrine of identification for which *Thorogood* v. *Bryan* (1) was responsible, but which was effectually laid to rest in *The Bernina* (2), save in so far as it arose from the relation of master and servant, or principal and agent. It is well settled that in the absence of special contract or statutory obligation no such relation exists as between bailor and bailee. As to *The Bernina* (2), Gibson J. brushes it aside with these words, "*The Bernina* (2) is not applicable to the present controversy. It was decided on Admiralty law, not the same as that governing the relation of bailor and bailee." With the greatest respect, this is a strange and complete misconception. The questions for decision in that case arose out of three actions brought under Lord Campbell's Act against the owners of the "Bernina" by the dependants of three persons who were killed in a collision at sea between the "Bernina" and another vessel, the "Bushire," caused by negligent navigation on the part of both ships. In one case, that of Owen, second officer of the "Bushire," he was found to have been in charge at the time, and directly responsible for the negligence; in the second, that of Armstrong, he was first engineer of the "Bushire," but was in no way responsible for its negligent navigation; while the third was that of Toeg, a passenger on the "Bushire": and in all three the main controversy was as to the application of this precise question of identification for which *Thorogood* v. *Bryan* (1) was responsible, not in connexion with Admiralty law, but with the Common Law doctrine of negligence.

(1) 8 C. B. 115. (2) 13 A. C. 1.

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Incidentally, and on the question of damages only, the point was raised in the Court of Appeal as to the application of the Admiralty rule of half damages, but it was abandoned and not argued in the House of Lords, where the arguments and judgments were solely conversant with the question of liability under the Common Law. In the Court of Appeal (1) (consisting of Esher M.R., Lindley and Lopes L.JJ.) it was held in the case of Owen that, as his personal negligence directly contributed to the injury, his administratrix could not recover, but that the action was properly sustainable in the cases of Armstrong and Toeg. It is impossible to read the elaborate judgments of the Court without being satisfied that they cover and include the present case, in which the relation between the parties was that of bailor and bailee, and not that of master and servant. They annihilate the doctrine of identification in so far as it was held in *Thorogood* v. *Bryan* (2), that a passenger must be treated as identified with the owner of the vehicle or ship in which he is carried, and therefore disentitled to recover for injury to his person or property as against a third party in every case in which the negligence causing the injury has been the joint act of the third party and the owner of the vehicle or ship. This was sufficient for the purpose of Toeg's case, as he was a passenger on the "Bushire," but in deciding also in favour of the plaintiff in Armstrong's case they went considerably further. Armstrong was a fellow-servant of Owen, whose negligence directly contributed to the collision; but while they agreed that on this account the action would have failed as against his own employers, they decided that the claim was good when brought against the owners of the other ship, which was equally at fault, Armstrong standing in no relation of servant to them.

The present is an a fortiori case, because it has been admitted—and I take it to be clear—that the plaintiff could have sued Chambers for injury to the car had it been solely caused by the negligence of Chambers or his servant while the car was in his custody and control; and when that injury has resulted from the joint negligence of two parties, of whom Chambers is one, it would be an extraordinary result if plaintiff was not entitled to

(1) 12 P. D. 58. (2) 8 C. B. 115.

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sue either or both of the tort-feasors. But I need not labour this case any further, as the point seems to me to have been conclusively settled by the highest authority. Both in the Court of Appeal and in the House of Lords counsel for the "Bernina," as did counsel for the defendants here, cited the case of *Vanderplank* v. *Miller* (1) as an authority for the proposition that the owner of the cargo of a ship cannot recover for its injury or loss against the owners of another ship if the injury has been occasioned by the joint negligence of that ship and the ship in which the goods are being carried. But, as Lindley L.J. points out, the report of the case is very meagre, and the plaintiff in the action may have been the owner or charterer of the ship in which the goods were carried. Further, the decision is in direct conflict with the case of *The Milan* (2), in which the facts were precisely similar. In his judgment in that case, which was approved to this extent by the Court of Appeal in the "Bernina," Dr. Lushington declined to follow *Thorogood* v. *Bryan* (3), or to apply the doctrine of identification, as between bailor and bailee, to the case of goods entrusted by the former to the latter for carriage on his ship. "Can it be reasonably contended," he asks, "that the owner of a cargo is responsible for the acts of the master and crew of the vessel in which his goods are laden, he himself not being owner or part owner of the ship? The owner of the cargo does not, it seems to me, commit any negligence contributory to the loss; certainly not by himself personally, certainly not by his agents, for the master and crew are in no sense under his control."

Similarly, in the present case, I am at a loss to see how the plaintiff can reasonably be responsible for the acts of Chambers and his servant in the driving of the motor car which, though his property, had for the time been bailed to Chambers, who alone for this purpose had the custody and control of it; and if further authority is needed, it will be found in *The Drumlanrig* (4). The case arose out of a collision between the "Drumlanrig" and the "Tongariro," which was admitted to be due to the fault of both vessels. In an Admiralty suit by the owners of the "Drumlanrig" claiming liability of limitation, the owners of

(1) 4 Moo. & M. 169.
(2) Lush. 388.
(3) 8 C. B. 115.
(4) [1911] A. C. 16.

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the cargo of the "Tongariro" appeared and claimed, not only a moiety, but the whole of the damages sustained. In the Admiralty Court it had been held by the President that they were entitled to a moiety only, and his decision was affirmed in the Court of Appeal (1), and subsequently in the House of Lords; but the importance of the case for the present purpose lies in the fact that no attempt was made to dispute the liability of the "Drumlanrig" to the owners of the cargo in the other ship. Lord Atkinson, in his judgment, citing from the judgment of Dr. Lushington in the *Milan Case* (2) the words that immediately follow the passage I have quoted, says:—"This would appear to me to be the precise line of reasoning which led the Court of Appeal and your Lordships' House in the case of *The Bernina* (3) to decide that the case of *Thorogood* v. *Bryan* (4) was wrongly decided, and to overrule it." If it has to be admitted, as I think it must, that the relation between the owners of the cargo and the owners of the ship, where they are different persons, is that of bailor and bailee, then, in my opinion, the "Milan," the "Bernina," and the "Drumlanrig" unquestionably decide that this doctrine of identification has no application to such a relation. If I am right in this, it disposes of this case in favour of the plaintiff; but I cannot overlook an alternative ground upon which Pim J. based his decision in favour of the defendants, holding as I do that it is fundamentally wrong. I refer to the following passage, in which he says: "But the effect of the whole verdict is not to find that the defendant was guilty of negligence which caused or contributed to the accident, but, on the contrary, to find he was not, for a finding that the defendant could not by any action of his have avoided the consequences of the plaintiff's negligence is a finding that the defendant's negligence did not contribute to the accident; see *Davey* v. *London and South-Western Railway Co.* (5). The result is that the jury have exonerated the defendant from all guilt." I entirely dissent from the proposition that if a jury find, as they did in this case, that both defendants and plaintiff were guilty of negligence, and that

(1) [1910] P. D. 49.
(2) Lush. 388.
(3) 13 A. C. 1.
(4) 8 C. B. 115.
(5) 12 Q. B. D. 70.

the defendants could not by the exercise of reasonable care have avoided the plaintiff's negligence, they thereby find that the defendants did not by their negligence contribute to the accident. The language of the learned Judge, as it seems to me, confuses the distinction that exists between negligence that contributes to the accident and negligence which is the ultimate cause, the proximate cause or the causa causans, as it has been differently described.

Negligence that does not contribute to the accident is irrelevant and immaterial, but the very plea by the defendant that the plaintiff was guilty of contributory negligence is an admission by him for the purpose of the plea that he was himself guilty of negligence that contributed to but did not cause the accident. This very question was fully discussed by my colleague Lord Justice O'Connor and myself in the recent case in this Court of *Neenan* v. *Hosford* (1), and the illustration taken of a collision at right angles at a cross-road between two motor cars, each going at an excessive speed, and neither giving any warning of its approach to the other, so that until the agony of the collision neither was conscious of the approach of the other, and consequently could do nothing to avoid it. If litigation in such circumstances arose between a passenger in one of the cars against the owner of the other for personal injuries, or by the owner of one car for damages to the vehicle, a jury would be bound to find that each was guilty of negligence contributing to the accident, and that the defendant could not have avoided the consequence of plaintiff's negligence, but they would also be bound to find that neither could the plaintiff have avoided the collision once he was confronted with the negligence of the defendant.

This, of course, would be a verdict for the defendant on the ground that the negligence of both not only contributed to the accident, but caused it, and is quite inconsistent with the notion that the jury by their findings exonerated the defendant from negligence contributory to the accident. Similarly, in the present case, the jury's findings must mean that it was the contributory negligence of the plaintiff that caused the accident, in the

(1) [1920] 2 I. R. 258, 268.

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sense that he could by reasonable care have avoided the accident, notwithstanding the negligence of defendants which contributed to it. If this were not so, the plea of contributory negligence would be identical with the plea that the accident was solely due to the negligence of the plaintiff; but in practice they are pleaded as separate and alternative defences, and were in fact so pleaded in this action.

In the view that I have taken on the question of the alleged identification of the plaintiff with Chambers and his servant, I need not consider the further contention relied upon for the plaintiff, that the finding by the jury that Montgomery was guilty of negligence in not keeping a look-out was unsupported by evidence, or was at least against the weight of evidence. If they meant by this, as I have been told at the Bar they did, that Montgomery should have stopped his car when, on emerging from the mouth of the Stranmillis Road, he saw the lorry of the defendants, I am not satisfied that I should have agreed in this view, more especially as they have also found that he was not driving at an excessive speed, and that he gave warning of his approach. If in these circumstances, finding himself confronted by an emergency, resulting from the excessive speed at which the lorry was being driven, he came to the conclusion, in the moment at his disposal for consideration, that it was less dangerous to proceed than to stop, and if this decision would have avoided the accident had it not been for the unforeseen contingency of the skidding of the lorry in the same direction, as the result of the sudden application of the brakes, I should have had great difficulty in holding that this was any evidence of negligence on his part. Upon the other hand, it was essentially a question for the jury, which in this case was a special jury, of which some at least had a local knowledge of the situation and of the standard of care and caution reasonably to be required in the circumstances existing; and had it been necessary to decide this question, I should have required further argument and consideration before dissenting from the jury's conclusion.

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RONAN L.J. :—

The principle of *The Bernina* (1), which was decided on the Common Law, as applied to a case like the present by this Court in *Devlin* v. *Belfast Corporation* (2), establishes two propositions: 1, that if the plaintiff was a stranger to the entire matter, he could have sued King, and recovered the entire damage from him; and, 2, that in such an action King could not avail himself of a defence of contributory negligence which he might have had against the driver of the other car in an action by him. Holmes L.J. dissented in the case on the evidence and findings; but he did not dissent from the law laid down as above by Walker C. and FitzGibbon L.J. He says: "Assuming that the collision was the result of negligence in the management of those conveyances, the point for the jury to determine was whether such negligence is to be attributed to one of the drivers or to both. If to both, it is admitted that the defendants are as fully liable as if their servant was the sole cause." It is also clear that if a stranger recovers the whole damage from one of the negligent parties he cannot make the other contribute.

Assuming that the defendants here would have a good defence as against the driver of the other car, or Chambers, his employer, the question arises: is there anything in the connexion which exists between the plaintiff and the motor car, or between him and the driver, which takes the case out of the general rule? At the present day there can be no doubt that the mere ownership of a chattel does not make a man liable for damage caused with it by a person for whose conduct he is not responsible. In early times the law was different: see Pollock and Maitland, vol. ii, pp. 471-474; Holmes's Common Law, pp. 24-7. There was a time "when a man was not only responsible for all harm done by his own acts, but also for that done by . . . inanimate things that belonged to him": 2 Pollock and Maitland, 472. The only edition of Holmes on the Common Law was in 1881. The later copies published are only reprints. The author points out that this principle applied particularly to things in motion, and refers to a maxim of a Judge in the time of Edward I—"that

(1) 13 A.C. 1. (2) [1907] 2 I.R. 437.

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where a man is killed by a cart . . . or in other like manner, and the thing in motion is the cause of death, it shall be deodand." He next refers to a ship, and instances the case of *The Ticonderoga* (1) as an actual survival of this doctrine. However, this case cannot now, I think, be regarded as an authority: see *The Castlegate* (2) in this Court, and the observations of Lord Watson in the same case (3).

The person for whose negligence liability is sought to be attached to the plaintiff is Montgomery. The plaintiff had no connexion of any sort with Montgomery: he was the servant of Chambers; there was a relation between the plaintiff and Chambers. This relation certainly did not make Montgomery the servant of the plaintiff. But even if Chambers himself had been driving, it cannot be contended that the plaintiff would have been liable for his negligence in injuring a stranger. There is no suggestion of any negligence on the part of the plaintiff or his servants in handing over the possession and complete control of the car to Chambers. In fact, the plaintiff was a stranger to the transaction in every respect, except that he was the owner of one of the delinquent cars. (A) Assume that plaintiff had himself been on the road, and had been knocked down and injured by the collision, caused by the combined negligence of Whan and Montgomery, is there any doubt that he could have sued either or both? (B) Assume that another car of plaintiff's had been on the road, and was so injured, is there any doubt that he could have sued either or both? Is there any doubt that in these cases no question of contributory negligence as between Whan and Montgomery could be raised as a defence? Why? Because the plaintiff's cause of action in each is a pure case of tort. In case A, he was lawfully on the road; in case B, his property was lawfully on the road. Two wrongdoers, between them, by their negligence, injured him or his property without default on his part. There was no contractual relation between him and Montgomery, no privity of any kind.

Does it make any difference in the present case that Montgomery was in control of the property injured? It was lawfully

(1) Swabey, 215. (2) 29 L. R. Ir. 55.

(3) [1893] A. C., at p. 52.

on the road, and he injured it by his negligence. Does the fact that he was lawfully in control of it affect his liability to the owner? There is no contractual liability on his part. It is a pure tort, not a tort springing from contract.

The simplest test is to take the three persons, plaintiff, Whan, and Montgomery. There is then no contractual liability; no question of primary right. If the plaintiff could sue either or both, does the fact that he has also a contractual right of action against a fourth person (Chambers) affect his rights and remedies against Whan and Montgomery? If Whan sued the plaintiff for injuries caused by Montgomery's negligence, it is admitted that plaintiff would not be responsible. But if the plaintiff sues Whan for injuries arising out of the same transaction, it is contended that, though the same relation exists between them, he is responsible for Montgomery's negligence. The only case we have been referred to in which a relation having these results was found to exist is *Thorogood* v. *Bryan* (1). In my opinion, it would have made no difference in that case if the plaintiff had been the owner of the omnibus and horses, but had let them for a year to the employer of the driver. A lease of chattels is a bailment.

In *The Bernina* (2) Lord Watson says, at pp. 17–18: "I do not think the very eminent Judges who decided *Thorogood* v. *Bryan* (1) intended to affirm that the deceased by taking his seat in the omnibus incurred the same responsibility for the negligent acts of the driver as if the latter had been his servant. If they did mean to do so, their conclusion might be perfectly logical, but their premises would be directly at variance with the principles laid down in *Quarman* v. *Burnett* (3), which I have always regarded, and still regard, as a sound and authoritative precedent. If they did not, then they have affirmed that a passenger travelling by a public conveyance may be so unconnected with the driver as to be exempt from liability for his negligence, and yet be so identified with him as to lose all right of action against wrongdoers, whose negligence, in combination with that of the driver, has occasioned personal injury to himself. That is a proposition which it is very difficult to understand. It must be a

(1) 8 C. B. 115. (2) 13 A. C. 1. (3) 6 M. & W. 499.

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singular kind of relationship, and created by very exceptional circumstances, which results in the superior being affected by his inferior's negligence in a question with wrongdoers, and not in a question with persons who are themselves free from blame." I do not think we should in the present case establish a relationship of this class.

This disposes of the case; but even if I were of opinion that plaintiff was responsible for Montgomery's negligence, my present opinion is that either the judgment of Gordon J. should be restored or that there should be a new trial. I shall only say now that my opinion is: 1. That on the evidence the two findings as to look-out cannot stand together. 2. That *Loach's Case* (1) is an express authority that where the defendant's negligence is excessive speed and the plaintiff's deficient look-out, the defendant is liable. 3. That the order in time of the plaintiff's and defendant's acts of negligence is not the test of liability: *Loach's Case* (1) and the judgment of Lord Shaw in the *Leyland Shipping Co.* (2). 4. As to the first finding of defendant's negligence: was it negligence "irrespective of the consideration whether it contributed to the accident or not," or negligence which contributed to the collision (see *Devlin's Case* (3) at pp. 441, 457, 460)? If the latter, it involved the propositions that it was part of the cause, and that the accident would not have happened without it; that is, that if the defendant had taken due care it would not have happened, or that he could have avoided it by due care. The same remarks apply to the finding of the plaintiff's negligence. If read in this latter sense, a finding that the defendant could not have avoided the accident would be wholly inconsistent with it. On the other hand, if the first finding only meant that the defendant was negligent, but that his negligence was not part of the cause of the accident, then the findings would be consistent. 5. As to the third finding: the finding is not that the defendant could not have avoided "the accident," but that he could not have avoided "the consequence of the plaintiff's negligence." That is, in my opinion, quite consistent with the meaning that he could not have avoided it after

(1) [1916] 1 A. C. 719. (2) [1918] A.C., at pp. 368–369.
(3) [1907] 2 I. R. 437.

the occurrence of the plaintiff's acts of negligence; indeed I think it is the primary meaning. At all events, the finding is ambiguous.

Having regard to the judgment of the House of Lords in *Grayson* v. *Ellerman Lines* (1), following the later cases, I think we must take it that the proper question is, "could he have avoided the accident or the mischief?" not that put in this case. The question, as put by Gordon J., was not objected to on the part of the plaintiff, but nevertheless I am of opinion that the Court should not enter final judgment for the defendant on these findings.

O'CONNOR L.J.:—

The general principle of our law is that if a man, without fault in himself or in those for whom he is responsible, is injured in his person or property by the combined negligence of others, he can sue and recover damages from those who caused his injuries, and his action may, at his option, be taken against them jointly or against any one or more of them. In *Thorogood* v. *Bryan* (2) the plaintiff, a passenger in an omnibus, without any negligence on his part, was injured by a collision with another omnibus, caused by the negligence of the driver of the plaintiff's omnibus and the negligence of the driver of the other omnibus. To plaintiff's action it was answered that he had, by voluntarily submitting himself to the control of the omnibus driver, so identified himself with the latter's management of the vehicle as to become responsible for it, and accordingly as that driver had by his negligence directly contributed to the accident, the plaintiff was not entitled to recover. This doctrine of identification, for the purpose of the law of negligence, of one person with another who is not his servant or under his control, found favour with the Court of Common Bench, but was shattered, once and for all, by the decision of the House of Lords in *The Bernina* (3), which laid down that the suggested principle had no foundation whatever to support it.

The case for our consideration is not the case of a passenger, but the case of a chattel, voluntarily entrusted by the plaintiff to the control of a bailee, and it has been injured as the result of

(1) [1920] A. C. 466. (2) 8 C. B. 115. (3) 13 A. C. 1.

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the combined negligence of the bailee and the defendant. The King's Bench Division have held that the negligence of the plaintiff's bailee in the occurrence whereby the chattel was injured is an answer to the plaintiff's claim. With all respect, I cannot agree. The suggested identification for this purpose of bailor and bailee seems to me to suffer from the same defect as the attempted identification of the passenger with the driver of the omnibus wherein he takes his seat. I think there is as little to support the one as the other. The plaintiff in *Thorogood* v. *Bryan* (1) was entitled to recover damages for his personal injuries. Is it to be said that if he was carrying a parcel in the omnibus, he would not be entitled to recover for damage to the parcel? A passenger in a railway train injured by a collision with a train of another company can sue both companies (or either at his option) where his injuries are caused by the negligence of both. Wherefore shall he not have the same right in respect of his trunk damaged in the same collision? Is it because he has trusted his trunk for carriage to one of the companies? That is strange reasoning, for he has trusted his body for carriage to the same company; and this trust, it is now well settled, is quite an immaterial consideration for the purpose of determining who shall pay his loss.

I am, therefore, of opinion that the broad doctrine of identification of bailor and bailee in a case of this kind, as laid down by the King's Bench Division, has no legal principle to support it. But it may be said that in this case the chattel bailed, the motor car, was entrusted to the bailee upon conditions which involved its being driven upon the highway; and that, therefore, the plaintiff cannot recover if an accident happens which is contributed to by the negligent driving of the bailee. That, I think, is also an immaterial consideration. The bailor is in no sense the master of the bailee or of the bailee's servant; he is not responsible to others for the negligence of the bailee or the bailee's servant; nor, for the reasons that I have already stated, can I see that he is disentitled to recover where his chattel has been injured by the negligence of a third party, even though his bailee, by negligence in its authorized or permitted use, has contributed to the injury. In fine, I am of opinion that to disentitle

(1) 8 C. B. 115.

the plaintiff from recovering in an action of negligence where the injury has been partly caused by the defendant's negligence, there must be negligence on the part of the plaintiff or some person to whom he stands in the relation of master to servant.

The question of the identification of a bailor with his bailee in negligence cases was decided adversely to the defendant's contention here in *The Milan* (1). If *Vanderplank* v. *Miller* (2) is a decision the other way, which is doubtful (see remarks of Esher M.R. in *The Bernina* (3)), I prefer the reasoning and decision in *The Milan* (1).

Certain other questions have been argued before us, based on the findings of the jury. But I do not think there is much substance in the points raised on their findings, which there was evidence to support, and which, fairly read, seem to me to establish a transaction which was partly directly contributed to by the defendant; and for the reasons I have stated that seems to me to dispose of the case. I am of opinion that the appeal should be allowed and judgment entered for the plaintiff with costs.

Solicitor for the appellant: *J. C. W. Rea.*
Solicitor for the respondents: *Frank Kerr.*

C. L.

(1) Lush. 388. (2) Moo. & M. 169. (3) 12 P. D., at p. 77.

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WHELAN *v.* REX (1).

Court-martial — Constitution — Qualification of member — Person of legal knowledge and experience—Restoration of Order in Ireland Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 31), *sect.* 1, *sub-s.* 2 (*b*)—"*Proceedings*"—*Rule of Procedure* 95A, *Army Act*, 1881 (44 *&* 45 *Vict. c.* 58).

Under sect. 1, sub-s. 2 (*b*), of the Restoration of Order in Ireland Act, 1920 (10 & 11 Geo. 5, c. 31), a Court-martial, when trying a person charged with a crime punishable by death, shall include as a member of the Court a person of legal knowledge and experience.

W. was sentenced to death by a Court-martial, no question as to the qualifications of the members of the Court being raised. He afterwards applied to the King's Bench Division for a writ of certiorari to quash the conviction on the ground that no certificate as to the legal knowledge and experience of a member of the Court was handed in.

The application was refused on the ground that, in the absence of any objection at the trial, there was a general presumption of law that the Court was properly constituted; *omnia praesumuntur rite esse acta.*

EX PARTE APPLICATION for a writ of certiorari to bring up for the purpose of being quashed the finding of a Court-martial, by which Thomas Whelan was convicted of the murder of Captain G. F. Baggally. The facts are set out in the judgment of the Court, which was delivered by the Lord Chief Justice.

S. L. Brown K.C. (with him *Williamson K.C.* and *Bewley*), for the applicant:—

Section 1, sub-s. 2 (*b*), of the Restoration of Order in Ireland Act, 1920 (10 & 11 Geo. 5, c. 31), and Regulation 69 (5), made thereunder, require that a certificate of the legal knowledge and experience of a member of the Court-martial should be handed in, and "it must be stated in the proceedings of the Court-martial that this provision has been complied with." No such certificate was handed in. The conviction was therefore bad, and should be quashed.

(1) Before MOLONY C.J., and GIBSON and SAMUELS JJ.

MOLONY C.J. :—

Thomas Whelan was tried by a general Court-martial, held at the City Hall on the 27th January, 1921, for the murder of Captain G. F. Baggally. He was found guilty of murder, and sentence of death was passed upon him, which now awaits confirmation by the proper authority.

It is alleged in the affidavit of Mr. Noyk, Whelan's solicitor, that the certificate required by sect. 1, sub-s. 2 (*b*), of the Restoration of Order in Ireland Act, 1920, and Regulation 69 (5) of the Restoration of Order in Ireland Regulations, was not put in evidence during the proceedings; and it is contended by Mr. Brown, on behalf of the prisoner, that it was essential that this should have been done, and application is now made for a writ of certiorari grounded upon this alleged omission.

Under sect. 1, sub-s. 2 (*b*), of the Act, a Court-martial when trying a person charged with a crime punishable by death shall include as a member of the Court one person (who need not be an officer, or, if an officer, need not possess such qualification as is mentioned in sub-s. 3 of sect. 48 of the Army Act), nominated by the Lord Lieutenant, being a person certified by the Lord Chancellor of Ireland or by the Lord Chief Justice of England to be a person of legal knowledge and experience.

Section 69, sub-s. 5, of the Rules of Procedure is as follows:— "A Court-martial for the trial and punishment of a person alleged to be guilty of a crime punishable with death shall include as a member of the Court a person nominated by the Lord Lieutenant and certified by the Lord Chancellor of Ireland or the Lord Chief Justice of England to be a person of legal knowledge and experience, and such person need not be an officer, or, if an officer, need not possess such qualification as is mentioned in sub-s. 3 of sect. 48 of the Army Act; and in any such case it must be stated in the proceedings of the Court-martial that this provision has been complied with."

Let us now see what are the duties of a Court-martial when assembled for the trial of a prisoner. The first duty, under Rule of Procedure 22 A, made in pursuance of the Army Act, is to satisfy themselves that the Court is legally constituted, and it

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is specially provided that they are to satisfy themselves that each of the officers so assembled is eligible and not disqualified from serving on that Court-martial. It consequently became the duty of the Court to satisfy themselves that each member possessed the requisite qualification; and it is only after this has been done that the prisoner is to be brought in under Rule of Procedure 24, when, again, the prisoner will have the right, under Rule of Procedure 25, to object to any member of the Court, and the trial is only to proceed when the Court has ascertained that the Court is constituted by officers to whom the accused makes no reasonable objection.

We see that before the prisoner is brought in, the Court is bound to satisfy themselves as to the qualification of each member, and that when the prisoner is brought in he has the right of challenge. It is, however, contended in the present case that although the accused made no objection to any member of the Court, and deliberately abstained from so doing, he is now entitled to have the proceedings quashed because the certificate required to be given under the section was not put in evidence at the trial. Mr. Brown states that his entire case depends upon the concluding words of Regulation 69 (5): "and in any such case it must be stated in the proceedings of the Court-martial that this provision has been complied with . . ." Mr. Brown reads these words as saying that the certificate of the Lord Chancellor of Ireland or the Lord Chief Justice of England must be proved and put in evidence at the trial; and I presume also his observations will apply to the nomination by the Lord Lieutenant. This clause is not in the Act, and obviously refers to the record of the proceedings. The word "proceedings" has, however, a special meaning, and means the transactions of the Court as recorded by the Judge Advocate, or, if there is none, by the President of the Court-martial (Rule of Procedure 95 A), and which are to be forwarded to the confirming authority, and, after promulgation, to the Judge Advocate-General (Rule of Procedure 98 A).

In this case there is no reason to assume that the Court did not do its duty, and ascertain the qualification of the members, as it was required by the Rules of Procedure to do, or that such

fact will not appear on the record of the proceedings as made up by the proper officer. The case might be different if the certificate had been asked for and refused, or if any point grounded on its non-production had been made; but, in the absence of any objection at the trial, it seems to us to be clear that this is a case where the maxim omnia presumuntur rite esse acta applies, and the contrary view does not appear to be arguable. The general presumption of law is that a person acting in a public or judicial capacity is duly authorized to do so, and it is unnecessary to refer to the many authorities to this effect, from the decision of Lord Ellenborough in the *King* v. *Verlest* (1) in 1813 down to the present day, which cases are collected in Taylor on Evidence, 11th ed., vol. i, pp. 145–148, and also in Broom's Legal Maxims, 8th ed., p. 740.

Solicitor for the applicant: *Michael Noyk.*

H. H.

(1) 3 Campbell, 432.

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MAGOWAN *v.* MAGOWAN.

Practice – Matrimonial—Alimony—Sum fixed by Consent—Power of Court to vary—Lapse of time—Or. 70, *r.* 58.

The Court has jurisdiction to vary the amount of alimony fixed by consent of the parties; and made an order increasing the amount payable notwithstanding the lapse of eleven years, the husband's means having considerably improved in the interval.

MOTION ON NOTICE.

In the year 1910 proceedings were pending for a divorce a mensa et thoro; but before the action came on for trial the parties arrived at a settlement, which settlement was made a rule of Court. Though it did not appear in the order, it was admitted that the payment of alimony at the rate of £1 per week was one of the terms of the settlement, and alimony at that rate had been paid ever since. On the allegation (uncontradicted) of the petitioner that the respondent's financial position had improved, the petitioner now moved to have the amount of alimony increased.

Andrews K.C. (with him *Breti*), for the petitioner:—

In the changed circumstances the petitioner is not bound by the consent. I admit that the increased cost of living alone is not a sufficient ground for asking for an increase—that is an argument that cuts both ways; but the husband's financial position has improved. The Court has full jurisdiction under Order 70, rule 58. In *Gooden* v. *Gooden* (1) the agreement fixing alimony was expressly made without prejudice to any subsequent application to vary the amount, which distinguishes it from this case. Sir Francis Jeune P., at p. 399, says: "Nor should I, I think, be taking a correct view of Lord Penzance's decision if I did not hold that where a Judge has power to make such an order he has also power to vary it. Can it be said that if the

(1) [1891] P. 395.

husband's means become diminished there is no power to order a reduction in the wife's allowance? If so, why not in a corresponding case an increase? Therefore, I consider myself bound by the judgment of Lord Penzance to hold that I have power to make an order after decree, and also to vary an order after it has been made." *Scott* v. *Scott* (1) was a decision under a special provision of the Matrimonial Causes Act, 1907; the decision of Sir Henry Duke was subsequently reversed by the Court of Appeal (2), on the ground that the application was too late under the Act.

Beattie (with him *Serjeant Hanna*), for the respondent:—

I suggest that, the petitioner having suffered so long without complaint, this application is not bona fide. The Court has no power, I submit, to vary an order for permanent alimony made on consent. In England it is always the practice that the parties do not bind themselves absolutely and irrevocably. Where there is no order there is nothing on which the Court can operate. In *Hall* v. *Hall* (3) the order was made on consent, but it was expressed to be made "until further order"—an element on which the judgment of Lord Cozens-Hardy M.R. appears to have been based.

Ross J.:—

In this case the parties arrived at an agreement by consent, and the consent was made a rule of Court. One of the terms was that alimony should be paid at £1 per week. This does not appear in the order, but I propose to treat the question as if an order fixing alimony had actually been made.

Now, the general rule is that when an order expressing the intention of the Court has been made, the same Court has no jurisdiction to alter it: this is part of the appellate jurisdiction; but there are some cases in which from the nature of the subject-matter, and the objects provided for by the order, the Court has implied power to do so. Indeed, this has been expressly recognized by high authority.

(1) 37 T. L. R. 17. (2) 37 T. L. R. 158. (3) [1915] P. 105.

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Lord Penzance more than once held that he had power, owing to changed circumstances, to reduce the amount of alimony; and Lord St. Helier, by parity of reasoning, held that he had power to increase it. In this case it is plain that circumstances have changed considerably since 1910, and that the husband's financial condition has improved; and I am satisfied that alimony at the rate of £1 a week is an inadequate measure of his obligation. I make an order fixing alimony at the rate of £7 a month, the first payment to be made on March 1st next.

April 8, The respondent appealed to the Court of Appeal, who dismissed the appeal without calling on counsel for the petitioner.

Solicitors for the petitioner: *L'Estrange & Brett.*
Solicitor for the respondent: *Frank Kerr.*

T. C. T.

THE KING (GARDE AND OTHERS) *v.* MAJOR-GENERAL E. P. STRICKLAND AND OTHERS (1).

K. B. Div. (Crown Side) 1921.

March 23. April 20, 21, 25.

Martial law—Rebellion—Jurisdiction of the King's Bench Division.

The King's Bench Division of the High Court has the power when its jurisdiction is invoked to decide whether a state of war exists which justifies the application of martial law; but once such a condition of affairs is established to the satisfaction of the Court, it cannot interfere to determine what is or what is not necessary.

Held, following *Rex* v. *Allen* (ante, p. 241), that a state of war still existed in the martial law area, and accordingly that the Civil Courts had no jurisdiction durante bello to interfere with the decision of a Military Court sitting therein.

MOTION ON NOTICE.

To make absolute, notwithstanding cause shown, conditional orders of certiorari and habeas corpus issued to Major-General E. P. Strickland and to the Military Court sitting at Victoria Barracks, in the City of Cork, to remove into the King's Bench Division for the purpose of being quashed the record and proceedings of the said Military Court, before whom the trial of the prosecutors took place, and to the Governor of the Detention Barracks, Cork, in whose custody the prosecutors were detained.

The order was applied for on the grounds:—

1. That the said Military Court had no jurisdiction to try the prisoners.

2. That no state of war existed sufficient to justify the existence of martial law or a Court established in pursuance thereof.

3. That the names, professions, and places of abode of the witnesses for the prosecution were not given according to law or at all.

4. That the names of the members of the Military Court were not given.

5. That the said William Garde, John Harty, Edmund Terry, Maurice Moore, Robert Walsh, Pat Sullivan, and Jeremiah

(1) Before MOLONY C.J., and DODD, PIM, GORDON, and SAMUELS JJ.

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O'Leary were indicted and tried without the oath of two lawful witnesses to an overt act of treason.

6. That the proclamation under which the Military Court claimed to act was not proved or put in evidence at the trial.

The facts and circumstances of the application are sufficiently set out in the following extracts from the affidavit of Mr. Charles K. Murphy :—

1. I am solicitor with Mr. Maurice O'Connor, solicitor, Cork, for seven persons named in the title hereof who are at present in custody at the Detention Barracks, in the City of Cork.

2. I am informed and believe that the said William Garde, John Harty, Edmund Terry, Maurice Moore, Robert Walsh, Pat Sullivan, and Jeremiah O'Leary are detained in the custody and control of Major-General E. P. Strickland, the Competent Military Authority for the City of Cork.

3. The said William Garde, John Harty, Edmund Terry, Maurice Moore, Robert Walsh, Pat Sullivan, and Jeremiah O'Leary were taken into custody by military forces on the 20th day of February, 1921, at Clonmult, in the County of Cork, and were on the 8th day of March, 1921, brought before a tribunal purporting to be a military Court at the Military Barracks, at Cork, on a charge of levying war against His Majesty. I beg to refer to a copy of the charge sheet upon which marked "A" I have signed my name before swearing this affidavit.

Previous to the trial—namely, on the 1st day of March, 1921, a summary of the evidence was in the same place taken in the presence of the prisoners. [He referred to a copy of the summary served upon the accused.]

4. At the said trial a number of witnesses were examined for the prosecution and for the accused. The names, professions, and places of abode of the witnesses for the prosecution were not at any time given to the accused or their legal representatives, nor was a copy of the indictment furnished in the manner required by law ten days before the trial to the accused or any of them or their legal representatives.

5. At the trial counsel for the prisoners objected to the jurisdiction of the Court to try or punish the prisoners on the ground that the charge was one of high treason, and the prosecution and the Court were bound to observe the laws in relation to the trial of persons for high treason, and that they had not done so.

6. The prosecution failed to supply a copy of the indictment to the accused or their legal advisers ten days before the trial, and in the manner provided by statute; they further failed to deliver to the prisoners a list of the witnesses to be produced upon the trial, together with their names, profession, and places of abode. They also failed when requested to do so by counsel for the accused to supply the names of the members of the Court as corresponding with jurors.

7. The overt acts alleged by the prosecution were not proved upon the oaths and testimony of two lawful witnesses, and therefore no power existed to indict or try the prisoners as required by 1 & 2 Geo. 4, ch. 24, sect. 1. I beg to refer to the copy of the summary of evidence which corresponds with the indictment. From said summary it appears that the accused, Jeremiah O'Leary, was not identified at all, and that John Harty was identified by only one witness. The name of Jeremiah O'Leary, who was one of the persons tried, does not appear in said summary of evidence at all.

8. During the trial, which continued from the 8th day of March, 1921, to the nineteenth day of the same month, the Assizes were held in the City of Cork, and prisoners were tried for felonies and misdemeanours by the Lord Chief Justice of Ireland and Mr. Justice Wylie, sitting as Commission of Assize for the City of Cork. Courts under the Restoration of Order in Ireland Act were sitting at that time. I appeared before one on the 4th day of March, 1921. There was no disturbance, no insurrection, and no state of war then existing in the City of Cork, and there was no necessity for a Military Court or any military interference. The ordinary business of life and commerce was carried on, and a state of peace existed at all times, material to the present application, and still exists.

9. The proclamation under which the Military Court claimed to act was not put in evidence, and there was no proof that the Court sat under the authority of the Competent Military Authority.

In reply, an affidavit was filed on behalf of the Crown similar to that sworn by the Rt. Hon. Sir Cecil Frederick Nevil Macready in *Rex* v. *Allen* (1), in which General Macready deposed that "a state of open rebellion still existed in, amongst other places, the County of the City of Cork and the County of Cork and adjoining districts, such state of rebellion amounting to actual warfare of a guerilla character."

On behalf of the prosecutors numerous affidavits were filed from leading men of the City and County of Cork, including the High Sheriff of the City of Cork, the ex-High Sheriff of the County of Cork, Justices of the Peace, local merchants, and the President of University College, Cork, traversing the averment that a state of war existed in either the County or City of Cork, and alleging that the matters set forth on behalf of the Crown in the affidavit of General Macready did not amount to warfare. The several deponents alleged that the business of the last Assizes was satisfactorily disposed of; that the ordinary business life of the City and County daily continued; that the Petty Sessions

(1) [1921] 2 I. R. 244.

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Courts, and the County Courts, and the Court of Record for the Borough of Cork sat regularly, and duly discharged their business; that the trades and industries of the City and County were maintained; that the churches were open, and the schools continued to carry on their work; that the places of entertainment were open and frequented by the public, and that sporting competitions were held as usual in times of peace. They further submitted that Field General Court-martial was the regular Court adopted by the military, and that the military Court was not necessary if it was intended to comply with the procedure and punishments regulated by the law of the land.

In the course of a replying affidavit on behalf of the Crown, General Macready alleged "that the members of the so-called Republican Army availed themselves of the very facts and conditions of apparent peace relied upon in the affidavits filed on behalf of the prosecutors as cover for their preparations for and carrying into effect of various forms of guerilla warfare adopted towards His Majesty's forces, and averred that the fact that, even to a limited extent, ordinary life . . . can be carried on, is due to the presence of large numbers of Crown forces."

Serjeant M'Sweeny K.C., *Comyn K.C.* (with them *M'Carthy*), for the prosecutors, moved for writs of certiorari and habeas corpus, and, if necessary, for writ of prohibition, in order to question the finding of what was called a military Court. Counsel having stated the facts, continued: The charge against my clients, who were arrested upon the 20th February, and tried on the 8th March, was a charge of high treason—a charge of levying war against the King. The form of the charge is rather curious, because what was done is described as an offence (counsel read the charge sheet). At one time persons accused of high treason had very few rights; they had few privileges as prisoners. A series of statutes were from time to time passed in their relief. The prisoners in this case could have been tried in several ways which would have entitled them to the benefits of these statutes. They were tried in a way which deprived them of these benefits. One of the benefits was that the person charged was to have a copy of the charge given to him ten days before

his trial. That was not done in this case. Other important requirements of these statutes were that before the accused was indicted and tried there must be the oath of two lawful witnesses to the overt act of treason, and that the names, professions, and places of abode of the witnesses for the prosecution should be furnished to the accused. None of these provisions was complied with.

It is now suggested that it was a matter of military necessity that these prisoners should be tried by a military Court. The availability of the King's Courts for the purpose of trials for treason has always been regarded as a prime element in the question as to whether any military necessity existed. The King's Courts of all kinds were sitting in Ireland. There was nothing in the nature of serious obstruction to their operation.

The Legislature has, no doubt, by recent legislation provided for the trial in certain instances of crimes and offences by a statutory tribunal, and that tribunal was composed of military men. It followed to some extent the procedure of Courts-martial. But there was not a spot in Ireland where the civil Courts could not function at any moment. In the City of Cork in the same building the statutory Court which was specifically authorized to try the offence of treason, and which must try it according to the rules, was sitting side by side, from day to day, with this illegal military Court. Counsel referred to the struggle of the Judges in 1798 for possession of the prisoners, and said that Dicey and other writers treated *Wolfe Tone's Case* (1) as a decision that when the King's Courts were functioning the martial Court cannot prevail.

Counsel then referred to the correspondence between Lord Cornwallis when Lord Lieutenant and the Duke of Portland leading up to the legislation of 1799 (2) following the Irish Rebellion, 1798. The jurisdiction of the King's Courts could not be set aside without legislation. Sect. 6 of the Act of George 3 is regarded by every English writer as mere surplusage.

The existence of some Courts is not to be regarded as conclusive that war is not raging; but the existence and the functioning of all the King's Courts of every kind is conclusive that war is not raging.

(1) 27 State Trials, 613.

(2) 39 Geo. 3, c. 11 (Ir.).

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[Molony C.J. :—Are you asking this Court to review *Allen's Case* (1) ?]

Serjeant M'Sweeny K.C. : I submit there are circumstances in this case which distinguish it from *Allen's Case* (1). There must exist something more than slight disturbance to oust the ordinary jurisdiction—something that makes it impossible or greatly inconvenient to hold the King's Courts. In this case, unlike *Allen's Case* (1), the affidavits of the Crown are contradicted; and we have produced a body of testimony showing that it is improper to describe the condition of things as a state of war.

[The Lord Chief Justice :—You rely on the affidavits put in as establishing a difference between this case and *Allen's Case* (1) ?]

Serjeant M'Sweeny K.C. :—I deny that General Macready's view of the state of affairs is any better than the view of those who live and reside in the City of Cork. If the Court comes to the conclusion that on the whole evidence there is no state of war, and no difficulty in administering justice according to the law of the country, then these men are entitled to be released. [Counsel then referred to the charge of Palles C.B. in *Rainsford* v. *Browne* (2), and commented on the use of the words, "apparent peace," in the affidavit of General Strickland.] I wish to refer the Court to the opinion of Sir Edward Coke concerning martial law contained in the Appendix to the Historical Collections of John Rushworth—"I shall maintain jus belli. But God send me never to live under the law of conveniency or discretion. Shall the soldier and justice sit on one bench? The trumpet will not let the crier speak in Westminster Hall. Non bene conveniunt.

"The time of peace is when the Courts of Westminster are open, for when they are open, then you may have a Commission of Oyer and Terminer; and where the common law can determine a thing, the martial law ought not.

"Drake slew Doughty beyond the sea. Doughty's brother desired an appeal in the Constable and Marshal's Court, and Wray and the other Judges resolved that he might there sue. We make no law; we must not mediate ubi lex non distinguit. To hang a man tempore pacis is dangerous. I speak not of prosecution against a rebel. He may be slain in the rebellion, but if he

(1) [1921] 2 I. R. 244. (2) 2 N. Ir. Jur. 179.

be taken, he cannot be put to death by the martial law, 28 E. 2. M. 13. When the Courts are open martial law cannot be executed, 5 H. 4 and 30."

I also refer the Court to the arguments of Mr. Banks and Mr. Rolls, afterwards Lord Chief Justice Rolls, at page 79 of the appendix to the same volume. Mr. Rolls says: "The question is now when this martial law is to be used, and upon whom the Common Law is the highest for the subject, 7 H. 8 Kellway, 176; every liege man inherits the law, 19 H. 6, 63; it is the inheritance of the King. This great inheritance is not to be taken from him, and martial law is merely for necessity, where the Common Law cannot take place. Now, for the time when that necessity falls out, in time of peace it cannot, so we must consider when is time of peace or war."

Counsel also quoted from the Cornwallis Correspondence (vol. iii), from which it appeared that the Duke of Portland, writing on November 27th, 1798, from Whitehall, London, to the Marquis of Cornwallis, said: "Lord Castlereagh having informed Mr. Wickham that a writ has been moved for in the Court of King's Bench to bring up Moore, the rebel President of the Connaught Directory, now confined at Castlebar, and that it was intended to make a special return to the Court, His Majesty's confidential servants are particularly anxious in a matter of such moment, involving questions of great delicacy, the discussion of which may materially affect the principles of the Common Law and the maxims of State policy common to the both countries, that your Excellency should communicate to me as soon as possible the opinion which your Excellency and those whom you may have consulted on this occasion shall have formed on the whole subject."

Lord Cornwallis, replying on the 10th December, 1798, wrote: "His Majesty's Attorney-General and Solicitor-General have stated to me that they thought it their duty, under all the difficulties of clashing jurisdictions, not to involve the Executive power and the Courts of Law in any embarrassment on questions that might affect the principles of the Common Law; and this was the motive that induced their advising an obedience to the

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writ of habeas corpus issued in *Jones's Case* (1). From the same motive they recommend an obedience to any writ of habeas corpus that may be served on the person having the custody of Moore."

By the Restoration of Order in Ireland Act power is given to the military to try "crimes," and treason is defined as a crime. The accused could have been tried under that Act. The King may release the prerogative: *Attorney-General* v. *De Keyser's Royal Hotel* (2).

[The Lord Chief Justice: No one is relying on the prerogative here.]

Serjeant M'Sweeny K.C.: If the action of the military authorities is the action of the King, it is so by virtue of the prerogative. In support of my view, I refer to the preamble to the Restoration of Order in Ireland Act, 1920. He knew of no case, he said, in which it had been said that if the King's Courts were sitting and capable of functioning, a state of war prevailed.

The Lord Chief Justice: Take *Allen's Case* (3).

Serjeant M'Sweeny: There was evidence of interference with the Courts in *Allen's Case* (3), which does not exist here, so far as I remember. Counsel asked whether his Lordship (the Lord Chief Justice) sat at the Commission in Cork by leave of the General in Command of the Forces in Ireland.

The Lord Chief Justice: I did not sit by permission of any General. I sat in Cork by virtue of His Majesty's command, which no General could dispute.

Serjeant M'Sweeny pointed out that if the King's Courts only sat by permission of the military authorities, they had no jurisdiction to protect the lives of the King's subjects in the martial law area. That was the test, and that principle ran through all the cases reported on the subject.

[Pim J.: The Courts must scan the state of affairs, and see whether it was really so that a state of war prevailed. The Court had, in fact, decided that there was a state of war existing.

(1) Unreported. (2) [1920] A. C. 508.

(3) [1921] 2 I. R. 244.

Dodd J.: Was there a necessity for what had been done? There could be no argument about it once a state of war arose, and it was their duty to refrain from interfering with the military authorities, whatever the excess might be.]

Serjeant M'Sweeny: But there is no state of war, and I rely on the evidence of the citizens of Cork themselves.

Serjeant Hanna K.C. (with him *Best K.C.* and *Lipsett*), for the Crown:—

We submit that there are three questions to be considered in this case: 1. What did *Allen's Case* (1) decide? 2. Can this case be distinguished from *Allen's Case* (1) on any legal grounds by reason of the affidavits which have been filed on behalf of the prosecutors? 3. Whether, durante bello, this Court is competent to decide whether there is a state of war or not? 4. If it is competent to decide on the controversial affidavits, what should be the decision on the facts?

[The Lord Chief Justice: Whether there was a state of war in the area covered by the proclamation was open to us to decide, and in *Allen's Case* (1) we did decide it.]

Serjeant Hanna K.C.: This is the first time durante bello that the Court of King's Bench has been asked to decide whether a state of war existed or not. In *Allen's Case* (1) the point was not contested, the affidavits were uncontradicted; and in all the cases cited the existence of a state of war was conceded.

[Samuels J.: Is it your proposition that we are to accept the affidavit of the Commander-in-Chief that a state of war exists?]

Serjeant Hanna K.C.: Yes; together with the State documents referred to in it. Under the Letters Patent appointing the Lord Lieutenant there is delegated from the Sovereign the power to declare martial law in these words: "We give likewise to Our Lord Governor-General power and authority to give such Orders and Directions to the Commander of Our Forces for the time being within Ireland as he our Governor-General may judge necessary for the support of the Civil Authority, the collection of Our Revenue, the protection of Our loving subjects and the defence and security of Ireland, and for the suppression of

(1) [1921] 2 I. R. 244.

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tumults, insurrections, and of all traitorous or rebellious practices within the same; and by these Presents We give unto him power and authority of using and exercising within Ireland if need shall be Martial Law." (See Report of the Royal Commission on the Rebellion in Ireland, 1916, p. 102.) The proclamation of the Lord Lieutenant declaring martial law in the area under consideration was published on 10th December, 1920, and the proclamation of the Commander-in-Chief in Ireland declaring the army on active service was published on 12th December, 1920. If the Court claims the jurisdiction to decide whether a state of war exists or not against the view of the executive officer in command of the army, the decision in any particular case may depend on the constitution of the Court. The Court may not be in agreement, or a different Court may decide otherwise in another case from the same district. The point is one of very great importance.

[The Lord Chief Justice: In *Allen's Case* (1) we insisted upon the right of deciding whether a state of war existed or not, and we will continue to assert that right.]

Serjeant Hanna K.C.: I submit that this case is governed by *Allen's Case* (1) in toto. The incidents in this case and in *Allen's Case* (1) occurred within a few weeks of each other. In *Allen's Case* (1) the Court decided the fact that a state of war existed, and also held that durante bello the acts of the military were not justiciable. In other words, it decided the fact and the law applicable to this case. The offence in both cases was under the proclamation of 12th December, 1920, and there was an express provision that people who levy war would be tried, not at the Assizes or under the Restoration of Order Act, but by a military Court.

Your Lordships sit here as the King's Court; General Macready, acting in conjunction with His Excellency, represents the King. If the Commander-in-Chief comes into this Court and informs the Court that a state of war exists, and produces the proclamation issued by him and the proclamation of His Excellency, the Court should accept that evidence as irrebuttable.* It is to be presumed that they act bona fide in the discharge of

(1) [1921] 2 I. R. 244.

* See *Salaman* v. *Secretary of State for India*, [1906] 1 K. B. 613.—REP.

their duty: see *R.* v. *Governor of Wormwood Scrubbs Prison* (1) and *R.* v. *Governor of Brixton Prison* (2). If my proposition is not correct, it would seem to follow that any Court that sits during war would be entitled to decide whether war existed or not. Suppose an action was brought at the present moment while war is raging, there is no case which goes so far as to hold that military officers could be impleaded.

What amounts to war? That has been the subject of judicial decision: *Driefontein Consolidated Gold Mines* v. *Janson* (3); *The Village Belle* (4). The military governor is justified during war in acting on his own responsibility: cited from judgment of Willes J. in *Phillips* v. *Eyre* (5).

Comyn K.C., in reply, referred to extracts from the Cornwallis Correspondence (which the Court ruled were not admissible). He referred to *Reed* v. *Bishop of Lincoln* (6) as an authority for the proposition that the law permits historical works to be referred to as evidence of ancient facts of a public nature. On the question as to who was to be the judge of military necessity, he submitted that historically the civil power was always paramount.

Cur. adv. vult.

MOLONY C.J. delivered the unanimous judgment of the Court:—

William Garde and six other persons were tried before a Military Court, assembled at Victoria Barracks, Cork, for the offence that they, at Clonmult, in the County of Cork, on the 20th February, 1921, did, with other persons unknown, levy war against His Majesty by attacking, with arms, a detachment of His Majesty's forces.

The trial lasted from the 8th to the 19th of March, and the prisoners are stated to have been found guilty, but the sentence of the Court has not yet been confirmed or promulgated.

On the 23rd March an application was made to me for a conditional order for a writ of habeas corpus to produce the bodies

(1) [1920] W. N. 135.
(2) [1920] W. N. 397.
(3) [1900] 2 Q. B. 339.
(4) 2 Aspinall's Reports of Maritime Cases, 228.
(5) L. R. 6 Q. B., at p. 16.
(6) [1892] A. C. 644.

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of the prisoners, and a writ of certiorari to quash the proceedings of the Military Court, on the ground that the Military Court had no jurisdiction to try the prisoners, and that no state of war existed sufficient to justify martial law, or a Court established in pursuance thereof, and upon certain other grounds. This application was grounded upon an affidavit of Mr. Charles K. Murphy, the solicitor for the accused, in which it was alleged that there was no state of war then existing in the City of Cork, and that there was no necessity for any Military Court or any military interference, and, amongst other things, he relied upon the fact that the ordinary Courts of Justice were sitting in the City of Cork without interruption, and that the ordinary business of life and commerce was carried on in the city, and that a state of peace existed at all times material to the application, and still existed.

The affidavit also alleged that certain statutory requirements which apply to a trial at common law for the crime of high treason were not complied with.

If, however, it is once established that a state of war exists, and that a Military Court is empowered to act, it is quite clear that such a Court is not bound by the rules or procedure of the ordinary law.

In the present case there is no doubt from the documents that the accused were tried before a Military Court, acting under the direct authority of General Sir Nevil Macready in the execution of martial law, and in pursuance of the notice given by him in his proclamation of the 12th December, 1920, "that a state of armed insurrection exists, and that any person taking part therein, or harbouring any person who has taken part therein, or procuring, inviting, aiding, or abetting any person to take part therein, is guilty of levying war against His Majesty the King, and is liable, upon conviction by a Military Court, to suffer death."

In the case of *The King* v. *Allen* (1), in which I delivered the judgment of the Court on the 24th of February last, we were unanimously of opinion that there was at that date a state of war in the area included in the Lord Lieutenant's proclamation justifying the application of martial law, and the only question

(1) [1921] 2 I. R. 241.

which arises for decision in the present case is as to whether that state of war still continues.

Sir Nevil Macready, the General Officer Commanding-in-Chief in Ireland, and Sir Edward Strickland, the Military Governor of Cork have put in affidavits for the purpose of showing that such a state of war still exists, and, upon the other hand, Mr. Murphy, the solicitor for the accused, and certain well-known citizens of Cork, have made affidavits for the purpose of showing that Cork is in a peaceful state, and that the ordinary public, commercial, and social life of the city and the surrounding portions of the county is being carried on in the usual way, save in so far as the curfew regulations have interfered with them.

The issue having been thus fairly raised on the affidavits, a somewhat startling argument was addressed to us by Mr. Serjeant Hanna, that it was not competent for this Court to decide whether a state of war existed or not, and that we were bound to accept the statement of Sir Nevil Macready in this respect as binding upon the Court. This contention is absolutely opposed to our judgment in *Allen's Case* (1), and is destitute of authority, and we desire to state, in the clearest possible language, that this Court has the power and the duty to decide whether a state of war exists which justifies the application of martial law.

Sir Nevil Macready, in his affidavit filed for the purposes of this case, repeats the statements in his affidavit filed in *Allen's Case* (1), with the addition that he brings the casualties to the military and police forces up to date. Comparing the two affidavits, it appears that between the 1st June, 1920, and the 10th February, 1921, six military officers had been murdered in the martial law area; that on the 10th April, 1921, this number had increased to fourteen military officers murdered; that twenty-four of other ranks had been murdered up to the 10th February; but that this number had now increased to fifty-four; and that the number of eighty-four wounded had increased to one hundred and twenty-seven. It thus appears that in the short period of two months which elapsed between the swearing of the two affidavits, the casualties amongst the military forces had increased to an enormous extent. Unfortunately the same statement can

(1) [1921] 2 I. R. 241.

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be made as to casualties in the police force. In his affidavit of 10th February, 1921, Sir Nevil Macready refers to the fact that sixty-two members of the police force had been murdered and eighty wounded. It now appears from the supplemental affidavit of Sir Nevil Macready, sworn on the 11th inst., that these numbers had increased to one hundred and one murdered and one hundred and thirty-four wounded up to the 31st of last month. Sir Nevil Macready swears that the guerilla warfare is still raging throughout the martial law area, and his statement in this respect is corroborated by Sir Edward Strickland in his affidavit, who, of course, speaks with particular knowledge as the General Officer Commanding the 6th Division, and Military Governor of Cork.

Mr. Murphy in his affidavit refers to the statements detailed by Sir Nevil Macready as "isolated disturbances which cover an extensive period of time and a wide area, and are no indication of the state of Cork City and County. It is, however, impossible to accept Mr. Murphy's view upon this, having regard to the fact that the rebel forces are organized as a trained and disciplined military force, and that guerilla warfare has been adopted by them as the method best calculated to achieve their ends. This could not be put in more clear terms than is stated in the issue of "An T'Oglac"—the official organ of the Irish Volunteers—of October 1st, 1920, which is exhibited in Sir Nevil Macready's affidavit. It is there stated:—"For a year we have been preaching the necessity of a vigorous and sustained offensive against the enemy's front line, the R.I.C., and pointed out that the slackness of certain parts of the country made the problem unnecessarily simple for the enemy. In the South the guerilla offensive has been carried on for so long and so vigorously that any attempt by the R.I.C. to regain control of areas is out of the question, and the enemy can only rely on a big military concentration."

Mr. Serjeant M'Sweeny K.C. and Mr. Comyn, K.C., on behalf of the accused, strongly contended that there was no war existing in the City or County of Cork, because the Assizes were held there in March without interruption, and because it appears from the affidavits that the ordinary life of the city continued undisturbed. In the first part of the learned Serjeant's argument

he attempted to get round our decision in *Allen's Case* (1), which, following the decision of *Ex parte Marais* (2), held that the mere fact that Courts of Justice in the area were open did not negative the existence of a state of war. In this connexion it is necessary to clear up a misapprehension which seems to have affected the arguments of counsel. A reference is made in the affidavits to the fact that I sat as Judge of Assize in the City of Cork during the time of the trial of the accused; and it was suggested by counsel that I sat by permission, or at least with the consent, of the military authorities. No idea could be more erroneous. It is quite clear that the right of a Judge to sit is derived from the King and not from the military authorities under martial law. On the 24th January, 1921, His Majesty the King issued commissions under his Great Seal commanding the Judges therein named to hold Assizes in the various counties of Ireland; and the commission for the Munster Circuit was duly delivered to me. In it I was commanded to hold the Assizes in the counties of Clare, Limerick, Kerry, and Cork, and the cities of Limerick and Cork, on certain days to be appointed by me; and the commission then proceeds:—"We also command all and singular mayors, sheriffs, bailiffs, constables, and all other officers and ministers, and all other our faithful liege men and subjects of the several counties and cities, and counties of the cities aforesaid, and every of them, that to you, or any one or more of you in the execution of the premises, they be obedient, aiding and assisting as becometh."

So far, therefore, from being in any way subject to the military authorities, a Judge of Assize in the execution of the King's commission is authorized to command the assistance of every liege subject of His Majesty.

Serjeant M'Sweeny further contended that there can be no war in Cork, because several well-known citizens, headed by the High Sheriff of the City, have deposed to the fact that for some time there has been no disturbance or commotion in the City of Cork, with the exception of a bomb that was thrown at some police on the 12th instant. To this Sir Nevil Macready replies that the members of the so-called Irish Republican Army avail themselves

(1) [1921] 2 I. R. 244. (2) [1902] A. C. 109.

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of the very fact and conditions of apparent peace relied upon in the said affidavits as cover for their preparations, and for the carrying into effect of the various forms of guerilla warfare adopted towards His Majesty's forces, and that the bomb outrage to which reference is made in the affidavits was one of the attacks on certain of His Majesty's forces characteristic of the methods of guerilla warfare adopted and followed by the insurgents in martial law areas and elsewhere in Ireland for a considerable time past and up to the present date; and he further swears that the fact that even to a limited extent ordinary life in the City and County of Cork can be carried on is due to the presence of a large number of Crown forces, not only in certain stations, but moving rapidly and unexpectedly from place to place in the city and county.

We cannot lose sight of the fact that none of the persons who have made affidavits as to the peacefulness of the City and County of Cork appears to have had his attention drawn to Sir Nevil Macready's affidavit, and that the statements which he has made as to the organization, methods, and procedure adopted by the "Irish Republican Army" and the casualties sustained by the Crown forces are uncontradicted.

The facts deposed by these gentlemen are not inconsistent with and do not displace the facts deposed by Sir Nevil Macready and Sir Edward Strickland.

It was also urged with much persistence that, inasmuch as there is authority to try persons for such crimes by a Court-martial under the Restoration of Order in Ireland Act, 1920, there was no necessity to resort to a Military Court. That matter also received full consideration in *Allen's Case* (1), and is dealt with in my judgment. To put the matter in a word, once the state of war justifying martial law is established to our satisfaction, we cannot interfere to determine what is or what is not necessary.

The attempt to distinguish this case from *Allen's Case* (1) therefore fails on all grounds, and we must discharge the conditional order.

Solicitors for the prosecutors: *Charles K. Murphy* and *Maurice O'Connor*.

Solicitor for the Crown: *The Chief Crown Solicitor*.

H. J. M'C.

(1) [1921] 2 I. R. 244.

THE KING (RONAYNE AND MULCAHY) *v.* STRICKLAND AND ANOTHER.

K. B. Div. (*Crown Side*) 1921.

April 2, 25.

Martial law—Rebellion—Jurisdiction of the King's Bench Division.

When a state of facts exists which justifies the imposition of martial law, the forces of the Crown, without any proclamation, may be employed in executing it.

Held, following *R.* v. *Allen*, ante, p. 241, and *R.* v. *Garde*, ante, p. 317, that such a state of facts existed in the present case, and accordingly that the Court had no jurisdiction to inquire into, or pass judgment upon, the conduct of the Commander of the Forces in repressing rebellion.

This case was heard at the conclusion of the hearing of *Rex* (*Garde and Others*) v. *Strickland and others* (1). The facts and arguments were substantially similar.

[Counsel: *Comyn K.C., Wood K.C.* (with them *John F. Bourke*), for the prosecutors; *Serjeant Hanna K.C., Best K.C.* (with them *Lipsett*), for the Crown.]

MOLONY C.J. delivered the following unanimous judgment of the Court:—

The arguments addressed to us in this case were, in the main, the same arguments as those which did not prevail with the Court in *Allen's Case* (2) and in *Garde's Case* (1).

Special stress has been laid by Mr. Comyn and Mr. Wood upon three points:—

1. That there was a prerogative right in the King to proclaim martial law, but that this right had been surrendered or released by the Restoration of Order in Ireland Act, and that martial law cannot now be proclaimed at any time or in any circumstances without the consent of Parliament;

2. That the procedure applicable to a Court-martial under the Restoration of Order in Ireland Act, 1920, has not been complied with; and,

3. That the state of things existing at the time of Allen's trial has improved, and that no necessity now exists for the continuance of martial law.

(1) Ante, p. 317. (2) Ante, p. 241.

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We are of opinion that the first argument has no foundation in law. It is quite unnecessary for us to entangle ourselves in an academic inquiry as to the use of the word "prerogative." It is used sometimes in one sense, sometimes in another. The King is head of a standing army with the consent of Parliament. He cannot, it is conceded, merely by proclamation declare war inside his own dominions. It is also conceded that without such proclamation a state of things may exist when the military forces of the Crown may be employed "in executing martial law." We hold that when a state of things does exist which justifies the "execution of martial law," and such is proved to our satisfaction, our hands are tied.

The second argument depends upon the third. If war has ceased, then the only procedure which the military can adopt is that prescribed for a Court-martial under the Restoration of Order in Ireland Act; and if we were of opinion that the military authorities were confined to that procedure, the arguments which have been addressed to us would have great weight. We are, however, of opinion, for the reasons just given in *Garde's Case* (1), that a state of war still exists; and it is clear from our judgment in *Allen's Case* (2) that once the state of war is established we have no jurisdiction durante bello to inquire into or pass judgment upon the conduct of the Commander of the Forces in repressing the rebellion.

When the state of war is over, the acts of the military during the war, unless protected by an Act of Indemnity, can be challenged before a jury; and in that event even the King's command would not be an answer if the jury were satisfied that the acts complained of were not justified by the circumstances then existing and the necessities of the case.

We are unable to distinguish this case from *Allen's Case* (2) and *Garde's Case* (1), and the conditional order must, therefore, be discharged.

Solicitor for the prosecutors: *Barry Sullivan.*
Solicitor for the Crown: *The Chief Crown Solicitor.*

H. J. M'C.

(1) Ante, p. 317.

(2) Ante, p. 241.

MURPHY AND OTHERS *v.* HURLEY (1).

(1919. Nos. 6045, 6046, 6047, 6107, 6108, 6109.)

K. B. Div.
1920.
June 3, 4, 9.

Appeal.
1920.
Nov. 23, 24.

1921.
Jan. 18.

Landlord and tenant—Sea wall—Landlord liable to repair wall—Negligence—Flooding—Notice to repair.

The plaintiffs in these actions, which, by an order of the King's Bench Division, were tried together, were judicial tenants to the defendant of holdings situated on a peninsula on the sea coast of Kerry, portion of which was bounded and protected by a sea wall erected by the defendant in the year 1900. When the plaintiff's rents were revised for a new statutory term, the order of the Chief Commissioner in the case of each tenant was made "on the basis that the landlord keeps in repair as heretofore the sea wall on the western side of the townland from A to B on the map recorded," i.e., the sea wall originally erected by the defendant. During the month of September, 1918, the sea wall was damaged by high tides, which flooded the plaintiffs' holdings; and these actions were brought to recover damages in respect of such floodings. No notice of any want of repair of the sea wall had been given by any of the plaintiffs to either the defendant, who resided in London, or to a local employee of the defendant, whose duty it was to look after the sea wall, and who gave evidence at the trial that on the day before the damage was caused the sea wall was in good repair.

Held, by the majority of the Court of Appeal (Sir J. Campbell C., and Molony C.J., O'Connor M.R. dissenting), reversing the decision of the King's Bench Division, that, in the absence of notice to the defendant of the want of repair complained of by the plaintiffs, the actions were unsustainable.

MOTION on behalf of defendant for an order that the findings and judgments of the Judge at the trial be set aside, and that judgment be entered for the defendant, or, in the alternative, for a new trial.

Six actions brought for the recovery of damages for injuries to the six plaintiffs' lands by reason, as alleged, of the defendant's breach of agreements to repair a sea wall, near Fenit, in the County of Kerry, were by order of the King's Bench Division dated 18th day of December, 1919, tried together at the Kerry Spring Assizes, 1920.

(1) Before GIBSON, DODD, and SAMUELS JJ.

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The plaintiffs are tenants to the defendant of holdings adjoining the sea. The wall in question was built by the landlord in the year 1899–1900. Since that time he has repaired or purported to repair it. His obligation to repair it was admitted at the trial, and is expressly set forth in various fair rent orders and schedules given in evidence, the terms being that the rent has been fixed "on the basis that it is a condition of the tenancy that the landlord keeps in repair as heretofore the sea wall on the western side of the townland, from A to B. on the map recorded." In the order fixing the fair rent of one of the holdings of John Murphy, junior, the words "as heretofore" do not appear.

The report of the Judge of Assize, who tried the actions without a jury (O'Connor L.J.), sets out that "on the 23rd September, 1918, and following days there was a high tide, and, as I concluded, a fairly rough sea, and the wall gave way in several places, so that the plaintiffs' holdings were flooded . . . Mr. Conner K.C., while admitting the liability to repair, contended that it was to be measured according to the nature and quality of the wall, and that therefore if the breaches in the wall were occasioned by the original faulty construction as distinguished from a failure to keep it in repair, his client would be under no liability. This was the sole question as to construction raised by the defendant's counsel, and I stated in the clearest fashion that I agreed with it. . . . I came to the conclusion that the breaches were mainly caused by the non-repair . . . I was of opinion on the facts that the landlord had purported all through to effect reasonable repairs of the wall according to its nature and quality; that the circumstance that the repairs were not properly done was unknown to the plaintiffs, unless in so far as same was disclosed by occasional breaches in the wall; that contracts were based on such purported repair by him, and that accordingly the measure of his obligation was to be read, as argued on defendant's behalf, reasonable repair according to the nature and quality of the wall." . . . The wall is four feet wide at the base; it is about five feet high; it tapers from the base to the summit, where there is a concrete coping eighteen inches wide. The wall was built by means of a Board of Works loan, and the specification was put in evidence and proved by Mr. Hickson, engineer, according to whose plan it was

built, and who supervised its erection. The fabric of the wall is thus described in the specification: "Wall to be dry stone masonry, built to a batter from the inside of one in four, with large stones set on their quarry beds, and where necessary bedded in the foundations in concrete, all joints to be carefully hammer-spalled." The hammer-spalling was described to me by Mr. Hickson: it consists of small stones hammered between the interstices of the large stones, and pointed with cement. The object, of course, is to make the wall into a solid and practically watertight block, the weight of which would resist the tide and sea. It was obvious, as I thought, that the job, while it would be effective as long as the hammar-spalling remained perfect, or nearly so, required great care, attention, and expense; for if the hammer-spalling were allowed to go adrift, the larger stones forming the wall would be loosened, the soft core of the wall would be disintegrated, and a breach would in course of time become inevitable. Mr. Hickson thought that one year with another £50, or £60, annually would have to be spent on the wall for the purpose; it was proved by the defendant's agent, Mr. Benner, that the yearly expenditure was in fact very small. I came to the conclusion that the hammer-spalling had not been properly looked to; that the wall was, so to speak, starved; that it was getting worse every year, till 1914, when the breaches required a large expenditure; that by reason of this neglect the wall had now got into a bad condition, and that this neglect and not the original nature of the work was the main cause of the flooding. It was suggested that the breaches were caused wholly or in part by the alleged lack of proper foundation for the wall. I did not come to that conclusion. I drew the inference that if the wall always had continued to be what it was originally—a practically solid block—it would have stood the wind and weather. But, as Mr. Redmond Roche, one of the witnesses for the plaintiffs, thought that two of the breaches had occurred owing to the lack of proper foundation, I acted on his testimony and reduced the damages I would otherwise have given accordingly. I also reduced the damages I would otherwise have given, by allowing something for possible flooding that may have occurred on the occasion complained of from the south-east,

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where the wall ends. Certain decrees against defendant were given in evidence to show that he had previously allowed the wall to fall into disrepair; and I think it was urged that they formed some sort of an estoppel. I disregarded them entirely, however, in coming to my conclusion of the fact. I gave judgment to the several plaintiffs as follows:—John Murphy, jun., £100; Robert Parker, £15; Thomas McCarthy, £15; Timothy Moynihan, £25; John P. Murphy, £15; James O'Sullivan, £15."

P. Lynch K.C., *M'Elligott K.C.*, *J. M. FitzGerald*, and *James A. Reardon*, for the plaintiffs.

Serjeant Sullivan K.C., *Conner, K.C.*, *Norwood K.C.*, and *B. Roche*, for the defendant.

The arguments were similar to those subsequently urged in the Court of Appeal.

June 9. GIBSON J.:—

These consolidated actions, tried at last Tralee Assizes by Lord Justice O'Connor without a jury, relate to flooding of the several plaintiffs' holdings, alleged to have been caused by the defendant's breach of a term in the judicial tenancy orders imposing on the defendant an obligation to keep in repair a certain sea wall for a length of some three-quarters of a mile "as heretofore." There had been previously a loose stone wall which had been washed away, and the wall referred to in the Land Commission orders was built during the currency of prior fair rent orders by the defendant in 1899-1900 out of borrowed money. The exact site of the old wall and of the new wall, whether inside or outside the ambit of the holdings, was not proved, nor is there any evidence that the landlord was under any contractual or other obligation to erect or maintain either wall. The new wall ended at Slattery's adjoining holding, which was on lower ground; it was obviously designed as a protection against the sea, and notwithstanding its defective construction and the possible means of access of salt water from Slattery's side, through the boreens and otherwise, the wall fairly served its purpose for many years up to 1914. Serjeant Sullivan, for the defendant,

contends: 1. That the defendant was not legally responsible in respect of any insufficiency in the original construction (which the plaintiffs' counsel admitted), and that there is no evidence of any failure to keep in repair the imperfect wall such as it was. 2. That no action was maintainable unless the tenants gave notice requiring the landlord to repair. 3. That the flooding was caused by water pouring in from Slattery's side and otherwise; that the breaches in the wall could not have added to the flooding in such a way as to enhance the plaintiffs' damage, or at least that such enhancement is speculative, and does not admit of any calculation or reasonable estimate.

The fabric, not quite what was described in the specification as reported by the Judge, was based in part on sand, and from the method of construction was of uncertain life, and obviously would require constant attention and frequent repair. No obligation to erect, maintain, or repair a sea wall is proved to have existed in the original contract of tenancy, but the duty of repairing the wall built in 1899 and 1900 was accepted by the landlord as a term of the judicial rent, which otherwise might have been reduced. The second fair rent order applied to the whole wall, but the third order that is now before the Court, affirmed in 1916, limited the landlord's responsibility for repair to the stretch from A to B in the map, adding the words "as heretofore." The tenants appealed as to the whole of this limitation, not against the added words only; but their appeal was dismissed in 1916. In consequence of disrepair in 1914, actions were brought in the County Court and decisions were given, which were affirmed in 1915 and 1916 by the Judges of Assize—Ronan L.J. and Sir John Ross; the duty to repair, breach of that duty, and consequent damage were established.

The extent of the liability to keep in repair depends on the character of the wall, which counsel agree must be taken as it was built; the tenants are not entitled to have a better or more perfect structure. The words "as heretofore" point to the continuance of the duty to repair, and do not enable the landlord to escape liability because the wall was at that particular time in disrepair owing to his failure to perform his contract. The language does not import that the then possible defective condition of the wall

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from non-repair was to be taken as a clean and accepted starting-point, giving absolution for previous blameworthy omissions.

In my opinion, on the evidence, the Judge was entitled to find that the wall, however faulty or imperfect in original construction, would have resisted the assaults of the ocean if it had received reasonable attention. It had for many years been an efficient protection up to 1914; as regards outlay, it had been, as the Lord Justice describes, starved; and the portions which were repaired after 1914 did not give way. The tide in September, 1918, was not so unusual as to defy all human foresight.

The argument that it was a condition to enforcing liability for non-repair that the tenants should have given notice to the landlord cannot be accepted, for the following reasons. First, no such point was made at the trial, nor is it noticed by the Judge in his report. Further, the wall was an entire unit, for the benefit of all the frontage tenants; a breach anywhere would have submerged the total holdings. The contract to keep in repair ran with the estate and the holdings, whether the structure was on, or altogether outside, the holdings, as in *Lyle* v. *Smith* (1); *Ricketts* v. *Enfield* (2). Next, the landlord by his employee assumed the supervision of the erection, and he was aware of the responsibility attaching to him, enforced as it had been by two successful actions. Actionable liability, therefore, is established if damage was caused by default in keeping in repair. Serjeant Sullivan contends that no damage so caused was proved; that at most only a nominal sum could be awarded, and also that no calculation as to degrees of damage was possible. The evidence is regrettably loose. No levels were proved on either side, and our only information as to surface and contour is derived from alleged consequences, from the plaintiffs' map, and from the Ordnance map, which counsel agreed the Court might refer to. Slattery's holding, which lies beyond the wall which the defendant was to repair, is some feet lower than the ground, the subject of action; it might have been washed over by spring tides unless a wall had been erected in front a good deal higher than the wall protecting the plaintiffs' land. The space immediately behind the wall A to B is higher than that further inland. This space is

(1) [1909] 2 I. R. 58.

(2) [1909] 1 Ch. 544.

not shown on the plaintiffs' map as having been injuriously flooded; the sea water must have run over it, but the damage complained of arose from the water in large volume lodging in the lower ground behind, from which it could only escape, so far as it was not dried up, by the drain or channel leading down across the several boreens into Slattery's land.

Serjeant Sullivan urges that the flooding complained of is explained by other causes, and that the inroad of the sea through the breaches of the wall could not have prejudicially affected the plaintiffs, who, if the wall had remained staunch and perfect, would have equally suffered. These possible causes are as follows:—1, Water coming from Slattery's holding, which was unprotected by any wall; 2, water coming up by the boreens, which go direct to the sea, and up which the sea could make a passage; 3, waves dashing over the wall; 4, water penetrating under the sandy foundations. The first is the most material, and the Lord Justice has reduced damages by reason of this possible contribution to the water lodgment. Slattery's place is lower than the rest, and the flood there, if it reached the plaintiffs, would have probably done so by being forced up the drain shown on the map. Whether the deduction was properly allowed I need not consider; it was necessarily speculative. The Land Commission obviously considered that the wall from A to B would give a substantial protection notwithstanding that Slattery's front was open. If the wall had remained unbroken, the flood coming from Slattery's side might not have reached so high or stayed so long water-logging the ground.

The Commissioners, after viewing the place, obviously thought that the limited extent of wall would be valuable for the plaintiffs' protection; they did not regard it as useless by reason of the Slattery flank being left open. The possible effect of water from Slattery's being a factor was present probably in the County Court appeal cases; the Court must have decided that the addition of such water did not destroy the plaintiffs' right to damages.

I do not find that boreens communicating with the sea were relied upon at the trial, and it is quite clear that the Land Commissioners did not regard them as making the wall an unnecessary

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and useless addition. The level of the floor of the boreens and the height of the banks at the sides were not proved. The water coming over or under the wall is not a sufficient explanation of the flood. On the whole, therefore, I must hold that the defendant was not, on the above grounds, entitled to ask that only nominal damages should be assessed.

A further point was made, founded on Mr. Roche's evidence. If 17½ yards of wall were swept away by reason of the insufficiency of the wall as originally built—which fault no repairs could cure, and for which the defendant was not legally responsible—it is forcibly urged that the inrush of the tide through such wide aperture might by itself have flooded the land and done all the mischief; and that Mr. Roche's observation that only half the surface flooded is thus accounted for is absurd and unintelligible. His opinion as to the initial faultiness of the fabric being the cause of the breach is contrary to Mr. Hickson's evidence; is not accepted by the Judge; and hardly fits into the history of the structure, which for so many years was found efficient. How much of the wall rests on sand is not proved; probably a large part. The witness was not asked to give any explanation of his reference to half superficial area, whether he intended to refer to levels or otherwise. The Judge allowed a deduction from damages, Mr. Roche being plaintiffs' witness. It would seem that this was contrary to his own view as to the plaintiffs' strict legal rights.

Supposing that the plaintiffs are or may be entitled to more than nominal damages, it is next said that, on the materials before the Court, there is no basis for rational calculation. The evidence is certainly vague. The problem is one which hardly allows accurate computation. The action was for damage at a particular date. Evidence of prospective damage was given; no objection was made as to this; had there been, the Judge would probably have allowed an amendment. The topic was not adverted to by counsel, and I pass from it. How much of the mischief was caused by the breaches in the wall, and how much, if any, by other coefficients, can only be estimated roughly; and I cannot decide that there should be a new trial to make hydrostatic and other investigations, which, perhaps impossible or

useless, the parties did not attempt before the Lord Justice, whose assessment, on the view he took, is not excessive. The verdict, therefore, must stand. The difficulties that the Court had to encounter in the County Court actions were probably to some extent the same, and the Judges were able to find a solution of the perplexing problem. The explanations of the flooding now suggested, from Slattery's side and otherwise, were more or less the same all through, while the wall was there. The factors affecting the decision were constant, save as regards the supervening breaches, the increased age of the wall, and as regards the varying force and volume of the assailing sea, which in September, 1918, were so exceptional that they must have swept away the wall, even had it been properly repaired. The occurrence of the partial breaches, some distance apart, would suggest particular local mischief, which might be accounted for by absence of necessary repairs there; the greater part of the wall remained standing.

DODD and SAMUELS JJ. concurred.

J. B. B.

Nov. 23, 24.

The defendant appealed to the Court of Appeal (1).

Serjeant Sullivan K.C. and *H. D. Conner K.C.* (with them *B. Roche*), for the appellant:—

(They contended that there was no evidence of any default or breach of duty on the part of the appellant.) The fair rent orders cannot impose any higher liability upon the appellant than if he had demised the lands by instruments containing covenants to repair the sea wall; and in that case no actions would have lain in the absence of any notice to the lessor of the alleged want of repair.

(1) In the Court of Appeal, before SIR J. CAMPBELL C., and O'CONNOR M.R., and MOLONY C.J.

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P. Lynch K.C. and *J. M. FitzGerald* (with them *M'Elligott K.C.* and *Reardon*), for the respondents:—

Where the giving of notice to a lessor of the want of repair of demised premises has been held to be a condition precedent to liability on the landlord's part, it has always been on the ground that the lessee had and the lessor had not means of knowing of the want of repair. In the present case the appellant had an agent on the spot for the express purpose of watching the sea wall, and he admittedly inspected it on the day prior to the damage taking place. Further, in all cases where the want of notice was held fatal, the subject-matter of the covenant was within the ambit of the demised premises. Here the sea wall was not within the ambit of any of the holdings which suffered from the flooding.

[The following cases were cited and discussed:—*Hugall* v. *M'Lean* (1); *Makin* v. *Watkinson* (2); *London and South-Western Railway Co.* v. *Flower* (3); *Manchester Bonded Warehouse Co., Ltd.*, v. *Carr* (4); *Torrens* v. *Walker* (5); *Vyse* v. *Wakefield* (6); *Ricketts* v. *Enfield Churchwardens* (7); *Coulson* v. *Disborough* (8).]

1921. Jan. 18.

SIR JAMES CAMPBELL C.:—

These proceedings originated in six actions by separate plaintiffs, but by order of the King's Bench Division of the 18th December, 1918, it was directed that they should be consolidated and tried as one action by a Judge without a jury at the Assizes for Co. Kerry. The defendant, whose fixed residence is in London, is the owner of certain lands which form a peninsula or island near Fenit, on the coast of Kerry. He has a residence on these lands which he occasionally occupies, but generally lets for the summer months, and in this particular year it was let to a Mr. M'Gowan for a period which included the month of September. The remaining lands are in the hands of tenants. In the case of four out of the six plaintiffs their lands are bounded on the west by the shores of the Atlantic Ocean, and,

(1) 53 L. T. N. S. 94.
(2) L. R. 6 Ex. 25.
(3) 1 C. P. D. 77.
(4) 5 C. P. D. 507.
(5) [1906] 2 Ch. 166.
(6) 6 M. & W. 442; 7 M. & W. 126.
(7) [1909] 1 Ch. 545.
(8) [1894] 2 Q. B. 316.

as a protection against the inroads of the sea, the defendant, at his own expense, through a loan from the Board of Works, erected in or about the year 1900, a coast wall, running along the western boundary of these lands. It is nearly three quarters of a mile in length, and was built at a cost of £300. It is important to understand the precise position of this wall in relation to the seashore on the one side and the lands of the plaintiffs on the other, as shown by the maps in evidence at the trial. They prove it to have been built on ground which is mapped into the holdings of four of the plaintiffs. The wall itself is distant but a few feet from the high-water mark at ordinary tides, and running practically along this mark, and parallel with the wall, is a shore road which extends beyond the wall at both its ends. The wall on the sea side is seven feet in height, and five feet on the land side, the difference being due to a gradual rise in the lands as they border the wall, and its width is four feet.

The six plaintiffs are judicial tenants of the defendant, at rents which have been periodically revised by the Irish Land Commission under the provisions of the Irish Land Acts. When revised for the second term, the rent was fixed in the case of each of the plaintiffs on the basis of the landlord keeping in repair the sea wall on the western side of the holding. When these rents came to be revised for a third term in 1914, the sub-commission, by their order in what is known as the pink schedule, departed from this form and altered it to the following: "On the basis of the landlord keeping in repair the sea wall on the western side of the townland." This was a material change, because a reference to the maps will show that the wall itself fell far short of extending along the western side of the entire townland; but upon appeal by the defendant to the Head Commission the words were varied, and the order prescribed that it was "on the basis that it is a condition of the tenancy that the landlord keeps in repair as heretofore the sea wall on the western side of the townland, from A to B on the map recorded," or, in other words, the actual wall which had been erected in 1900. The tenants were dissatisfied with this limitation of the wall, and applied to have it varied by extending it to C on the map. Had

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this application succeeded, it would have involved the defendant in the expense of continuing the wall right along the western frontage of lands in the occupation of other tenants; but the Court declined to accede to it. Serious damage was done to this wall in 1914, with the result that the adjoining lands were flooded by the sea, and decrees were obtained by the tenants for compensation for the damage so caused.

It will be noted that these decrees were obtained at a date prior to the order on appeal, which altered so materially the words in the order of the sub-commission; and, while O'Connor L.J. at the trial, most properly in my opinion, totally disregarded for this and other obvious reasons these previous decrees, they will be found to have played an important part in the judgment of the King's Bench Division which was delivered by Gibson J. During the equinoctial period in September, 1918, the spring tides intervened, and lasted from about the 20th to the 24th September. It was proved that under normal conditions these spring tides caused a rise in the sea-level of about two feet, submerging the sea wall to a considerable height, but upon this occasion it is admitted the force of the tide was further aggravated by an inblowing wind, to the violence of which I shall hereafter refer. Two other features of the locality are also important, the first being three "boreens" or accommodation roads on the lands of certain of the plaintiffs, which run at right angles to the sea wall, and were plainly intended to afford access to the seashore and to the road which, as I have already mentioned, ran along the seashore on the sea side of the wall, and practically parallel with it. These "boreens" were admitted to be from at least six to eight feet in width, and, as the maps upon both sides plainly indicate, a gap of a corresponding size existed in three places of the sea wall as an exit from the road to the shore. It was suggested by counsel for the plaintiffs that there were in fact no gaps in these places, and that the surface of the roads where they met the wall was actually on a level with the top of the wall, but this is so plainly inconsistent with the maps and with the evidence of the defendant, who was the only witness examined on the point, that it can hardly have been seriously urged, more especially as it would leave a sheer drop of seven feet for horses

and carts emerging from the roads to the shore. They were plainly on a level with the land abutting the wall, which, as I have said, was two feet above the level of the shore. The second feature is a well-defined drain constructed on the lands and running right through them at a short distance from the wall, and more or less parallel with it. This drain continues into the lands of Slattery, which have no wall to protect them, and there is a sluice on his lands from this drain to the shore with its mouth or exit close to the edge of the sea at ordinary high-water mark. A similar sluice exists higher up, which has its exit through the wall. The pressure of the Atlantic during these days of spring tides, aggravated if not by a gale, at least by an inblowing wind of considerable violence, caused amongst its other effects several serious breaches in the wall, and this consolidated action was brought by the plaintiffs in respect of injury to their lands from being flooded by the sea, due, as they allege, wholly or substantially, to default by the defendant in his obligation to repair the wall. The defendant by his statement of defence, in addition to pleas traversing the default and the damage, specially pleaded failure on the part of the plaintiffs to give him any notice of the need for repair. The report by O'Connor L.J. of the proceedings at the trial is somewhat meagre, and while it records that Mr. Conner K.C., leading counsel for the defendant, applied for a non-suit at the close of the plaintiff's case, the Lord Justice merely reports the fact of the application, and its refusal by him, without indicating in any way the grounds of the application or his reasons for refusing it. In this situation we are entirely dependent on the recollection of counsel, and Mr. Conner has told us that he based his application on two general grounds: failure of proof, first, by the plaintiffs of any actionable breach of duty on the part of the defendant, and, second, of any damage to the plaintiffs resulting therefrom. He further tells us that in support of his first ground he referred to the absence of proof of notice, which was present to his mind from the pleading before him which he had himself settled, but that he did not make it, as I understood him, a ground of special and distinct requisition. Mr. FitzGerald, of counsel for some of the plaintiffs, who was present at the time, his leader at the moment being engaged in the other Court,

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frankly told us he could not depend on his own recollection, and did not question the account given by Mr. Conner. I lay emphasis on this, owing to the assumption by Gibson J. in his judgment in this branch of the case that the point was not taken at the trial—an assumption which I must decline to accept, not only in view of Mr. Conner's assurance to the contrary, but also in view of its obvious importance, as shown by the special plea in the defence, and by the question which, as appears from the report, was put to the defendant's caretaker whether he had received any complaints from the plaintiffs prior to the flooding alleged.

I attach every importance to what is called the course of the trial—a question which I fully discussed in the recent case in this Court of *Cullen* v. *Dublin United Tramways Company* (1), and I adhere to all I said on the subject then. But though in that case the particular point had not been raised by the pleadings, nor, as counsel frankly admitted, been taken at the trial by requisition or otherwise, my colleagues were of opinion that it could be raised in this Court, as it was an obvious point, and had been raised in the King's Bench Division on the new trial motion. Even if we had not Mr. Conner's assurance, we must, in the absence of any information from the Judge's report, have recourse to the pleadings to ascertain the issues which it was his duty to determine. Further, in my opinion, even had this question not been raised at the trial, it was open to the defendant to raise it, as he undoubtedly did, in the King's Bench Division, it being admitted that no notice, in fact, was given of the want of repair, and therefore in that Court, as in this, the one and only material fact was not in controversy, and could not have been altered had the question been raised at the trial, so that all considerations of surprise are out of the case: see *The Tasmania* (2).

So far back as 1870 it was decided in *Makin* v. *Watkinson* (3) that a lessor who has covenanted to keep the demised premises in repair is not bound to execute any repairs unless and until he has received notice from the lessee of the want of repair. In the case of *London and South-Western Railway Company* v. *Flower* (1) the same principle was applied to the following facts:—The defendants'

(1) [1920] 2 I. R. 63, 74.
(2) 15 A. C. 223.
(3) L. R. 6 Ex. 25.
(4) L. R. 1 C. P. D. 77.

predecessors in title had under the powers of an Act of Parliament constructed a road which by means of a bridge passed under the plaintiffs' railway, the Act providing that the works should be executed and maintained by the undertakers at their sole expense in all things. The superstructure of the bridge got out of repair without notice to or knowledge by the defendants that repairs were required, and the plaintiffs executed the necessary repairs themselves, and sued the defendants for reimbursement. It was held by the Court, Brett, Denman, and Lindley JJ., that the plaintiffs, through failure to give notice to the defendants of the want of repair, could not recover the cost. Brett J., in his judgment on p. 85, says: "The act is not a contract between the parties, but it is next door to it; and I decide this case upon the ground that the doctrine of *Makin* v. *Watkinson* (1) is as applicable to the construction of an Act of Parliament as to that of an ordinary contract. The reason of the thing is this, that where there is knowledge in the one party and not in the other, there notice is necessary. Any other construction would seem to me to be contrary to natural justice." When he here speaks of knowledge on the part of the person sought to be made liable, he plainly means knowledge in fact as distinguished from means of knowledge, because upon the preceding page he states that he is assuming that the defendants had by implication a right to go upon the railway for the purpose of inspecting the construction of the bridge and ascertaining whether or not it needed repair. Denman J. says: "One of the first principles of natural justice is, that, where a party is required, whether by a private contract or an Act of Parliament, to do an act the doing of which is contingent upon the necessity for it arising at some uncertain time, before he can be charged with a breach of duty in not doing the act he must have notice that the time for doing so has arrived, so as to have an opportunity of performing his obligation." Lindley J. concurred, basing his decision on *Makin* v. *Watkinson* (1).

These cases were approved and adopted in *Manchester Bonded Warehouse Company, Ltd.*, v. *Carr* (2), where the lessors' covenant was to keep the walls, roof, and main timbers in repair, by a Court

(1) L. R. 6 Ex. 25.
(2) L. R. 5 C. P. D. 507.

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comprised of Coleridge C.J., Grove and Lindley JJ., and were again considered by the Court of Appeal in England, consisting of Brett M.R., Baggallay and Bowen, L.JJ., in *Hugall* v. *M'Lean* (1), and definitely approved, Brett M.R. pointing out that *Makin* v. *Watkinson* (2) had been followed for fifteen years. This decision in *Hugall* v. *M'Lean* (1) is specially important, not merely by reason of the authority of the Court of Appeal, but also by reason of the findings by the jury, that the lessee did not know of the want of repair, but that the lessor had the means of knowledge; yet the Court held that notice by the lessee was essential, and that notice to the lessor aliunde was not sufficient. In that case the right was given to the lessor by the terms of the lease to enter upon the premises and inspect the state of repair. These decisions were followed by Warrington J. in *Torrens* v. *Walker* (3), where the covenant by the lessor was to keep in repair the outside walls of the premises, while the lessee covenanted to permit the lessor to enter and view the state of repair. After referring to *Makin* v. *Watkinson* (2) and *Hugall* v. *M'Lean* (1), Warrington J. says: "It is therefore not open to me to decide otherwise than that there was no breach of the covenant until the landlord had notice of the want of repair. It is not necessary to decide whether the notice must come from the tenant, but I think that it must be from the tenant and not aliunde." Mr. FitzGerald, on behalf of the plaintiffs, has since the argument directed our attention to the case of *Melles & Co.* v. *Holme* (4), but I fail to see how that case helps his clients, as it merely decided that where the disrepair of the demised premises was the direct result of defects in another portion of the same premises retained by the lessor for his own use and occupation notice from the tenant was not required, as the principle upon which the cases I have quoted were decided, and upon which no doubt was cast in the judgments, did not apply, whereas in the present case the wall was the outer boundary of the holdings of four of the six plaintiffs, and was in no sense in the use or occupation of the defendant, being, in fact, as the maps show, within the ambit of their holdings. This principle was in effect the application to covenants for repair between

(1) 53 L. T. N. S. 94.
(2) L. R. 6 Ex. 25.
(3) [1906] 2 Ch. 166.
(4) [1918] 2 K. B. 100.

landlord and tenant of the general principle for which *Vyse* v. *Wakefield* (1) is the leading authority, that where the event is a matter which lies within the peculiar knowledge of the one party to the contract or covenant, notice of the happening of the event must be given by him to the other before he can sue for a breach: see Halsbury's Laws of England, Contract, vol. vii, p. 434, note (*b*), where these cases I have quoted are cited as examples of the application of this principle.

These cases I have cited are quoted in Foa's text-book on Landlord and Tenant as establishing that in all cases where the lessor has covenanted to keep the demised premises in repair notice by the lessee of the want of repair is a condition precedent to his right to sue in damages for breach of the covenant. I cannot accept the suggestion that the many and distinguished Judges who were parties to the decisions I have cited, and which, so far as I can find, have never since been questioned, either misunderstood or misapplied the principle they assert. No one of the six plaintiffs attempted to deny his knowledge, or his means of knowledge, of the alleged want of repair. Indeed one of them, Parker, went so far as to say that "the wall always gives, sometimes in three or four places." Nor can I assume that their agent Roche, who said he found the wall in need of repair on the occasion when, for the purpose of litigation, he visited the place in June, 1918, failed to communicate the fact to his clients. Even if he did not, and even if the plaintiffs had not knowledge in fact, yet they had undoubtedly the means of knowledge, and if they failed to utilize them, *Hugall* v. *M'Lean* (2), as decided in the English Court of Appeal, is an express authority for the proposition that in the absence of notice to the defendant they must fail in this action. Nor can I appreciate the contention based on the fact that as to four of the plaintiffs, a portion only of the wall bounded the holding of each, while the holdings of the remaining two, though adjacent to, did not abut upon the wall. All six had claimed and obtained the insertion of this condition in their judicial tenancies, and were claiming the benefit of it in this consolidated action, and had ample opportunity, if only from the use of the shore and the shore-road,

(1) 6. M. & W. 442; affirmed 7 M. & W. 126 Ex. Ch. (2) 53 L. T. N. S. 94.

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for visitation and inspection. I cannot believe that if the lessee in the cases I have quoted had sublet the premises and gone to reside elsewhere, he would have been absolved on the plea of want of knowledge for his failure to give notice. Further, the case as made by them jointly was not of defective repair in particular places in the wall, but of default in repair of the wall as a whole. Nor can I yield to the argument that because the defendant, for his own reasonable protection as an absentee resident in London, employed his steward to inspect the wall weekly, and to repair it when necessary, he thereby absolved the plaintiffs from their obligation to give notice. No question was asked or evidence given as to any direction by the defendant to this steward to give him notice of the need for repair, and, even if it had, it would at best have only amounted to proof that the landlord, as in *Hugall* v. *M'Lean* (1), and in the other cases where the lessor by the terms of the lease had liberty to enter upon the demised premises for the purpose of inspecting the state of their repair, had the means of knowledge. As well might it have been urged in *Torrens* v. *Walker* (2) that, as the covenant only related to the outside walls of the demised premises, the lessor had as good an opportunity for observation and inspection as the lessee. A landlord situated as the defendant was in this case would be placed in an intolerable position, more especially having regard to the character and surroundings of the subject-matter of his obligation, if these tenants, with the knowledge or the means of knowledge of the need for repair, could abstain, as it was proved they did, from giving any notice to the defendant, or even to his steward, whom, as Parker admitted, they knew to be in charge of the wall for the defendant, and deliberately wait until the disaster, which, if their case was true, was inevitable sooner or later, had overtaken them.

O'Connor L.J., while holding, in agreement with counsel on both sides and with the judgment of Gibson J., that the measure of the defendant's obligation to repair the wall was to be determined by reference to the nature and condition of the structure as actually erected, proceeded nevertheless to determine it by reference to the specification of the wall to be erected. He says:

(1) 53 L. T. N. S. 94.

(2) [1906] 2 Ch. 166.

"The wall is four feet wide at the base; it is about five feet high; it tapers from the base to the summit, where there is a concrete coping eighteen inches wide." This measurement and description do not quite tally with the evidence of any of the witnesses, and I think the Lord Justice must have derived them from some plan that was before him, as he refers to the plan of Mr. Hickson, by whom the wall was built. Neither the specification nor plan, if any, was available in the King's Bench Division or upon this appeal, it being stated that the former had gone astray; but the Judge quotes from it the material portion, as follows:—"The fabric of the wall is thus described in the specification: 'Wall to be dry stone masonry built to a batter from the inside of 1 in 4, with large stones set in their quarry beds, and where necessary embedded in the foundations on concrete. All joints to be carefully hammer-spalled.'" He then describes the process of hammer-spalling as consisting of small stones hammered in between the interstices of the large stones and jointed with "cement," and adds that the object was to make the wall into a solid and practically water-tight block, which would resist the tide and seas. He further says that he drew the inference that if this wall had always continued to be what it was originally, a practically solid block, it would have stood the wind and weather.

He lays great stress on the hammer-spalling as the main factor in stability, and comes to the conclusion that it had not been properly looked after by the defendant. All this reasoning is based upon the assumption that the wall was built in accordance with the specification, whereas, if the evidence of the expert witnesses produced by the plaintiffs is to be believed, the wall as constructed departed from the specification in all its essential particulars. I shall quote in their own words the evidence given by these two witnesses. Mooney swore "that the wall was originally badly constructed; that it should have been cemented and laid upon a dry foundation. When repaired it was cemented. It should have been faced with one and a half inches of cement. The foundations should have been three to four feet deep." In the earlier part of his evidence he said, "A great portion of the beach is sand; there is some rock; nearly all sand in place in

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question. It would not stand any rough weather at all from the seaside." As to this latter statement, I am not certain whether he was speaking of the wall as originally constructed, or as it existed in September, 1918; but, if it was the former, it coincides with the evidence of Roche, who swore that it would be liable to go under a storm, owing to original defective construction; while the evidence of Mooney, which immediately follows this statement by him, seems to supply the reasons upon which he based because he adds: "Some of the foundations are on sand, some on clay. Where the wall is on sand it is not efficient. It shows signs of water coming under it; they took away the sand underneath."

The second expert, Roche, gave similar evidence, but more specific in character. He said: "The wall was, in my opinion, originally built with mortar cement badly mixed. Centre of wall was all mud. Back of wall on land side was built of stone and cement mortar, but not finished off, leaving weather and sea to wear it away. Foundation in sand except where it happened to meet a bit of rock. The wall had no backing. The wall consisted of seven to nine inches of stone, fourteen inches of mud, and seven to nine inches of stone again"; while upon cross-examination he made the admission I have already referred to, that "the wall would be liable to go under a storm, owing to original defective construction." Robert Parker, one of the plaintiffs, said: "The wall always goes, sometimes in three or four places. The spring tides in summer go up to the face of the wall. They take the sand from the foundations sometimes; sometimes the tides bring it back again." Contrast this wall as so described with the specification. It was to be a wall of dry stone masonry; in fact, it was a wall which for half its width had a centre of mud running throughout its entire length. The large stones were to be embedded in the foundations on concrete. In fact, there were no concrete and no foundations, the wall simply resting by its weight, like a Chinese wall, on the surface of the sand, except where it happened to rest on a rock. It was to be hammer-spalled, which involved the jointing of the spaces between the stones with cement. Neither Mooney nor Roche mentions the existence of hammer-spalling,

while in fact no cement, but mortar only, according to Mooney, or according to Roche mortar cement badly mixed, was used, until it was used by defendant for the purpose of repair. I can only explain O'Connor L.J.'s description of such a wall as a practically solid block capable of resisting storm and sea on the assumption that his mind was directed to the specification and not to the wall as actually built, while Gibson J., in saying that the wall as built was not quite in accordance with the specification, was describing in very inadequate language the cardinal and essential differences which in fact existed. No suggestion was made nor evidence given, as Gibson J. states, of the existence of any contractual or other obligation upon the defendant to build this wall. He did so out of his own bounty; and though entitled as between himself and his contractor to have it built in accordance with the specification, and at the contract price, the plaintiffs must take it as they found it, and the defendant's obligation to repair must be measured in relation to the actual wall, with all its radical and inherent defects.

There is some discrepancy between the evidence of plaintiffs' experts as to the existence of foundations; but in substance, I think, they are agreed that the wall as originally built had no foundations in the true sense of the term. Mooney says that it rested in some places on sand, and in the rest on clay; whereas Roche says that it rested entirely on sand, save where it happened to meet a rock; but they both agree that where it rested on sand it was not efficient. It is also remarkable that while O'Connor L.J. asserts it to have been, as originally built, a practically solid rock, capable of withstanding wind and weather, he, nevertheless, accepted and acted on the evidence of Roche, that as to two out of the nine breaches in the wall, one being by far the widest of all, and extending for fifteen feet, no amount of repair would have enabled them to withstand the inroad of the tides, owing to the absence of foundation; while, as to the remaining seven, the furthest Roche can go is to say: "They had some hold, and, I think, would have held." Even this was at best a matter for speculation; and when I turn to his description of these nine breaches the whole basis for it seems to disappear. As to Nos. 1 and 2, the reason he gives for his belief that no repair

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would have enabled them to stand is that they had no foundation whatever; whereas in his previous description of them he says that No. 1 was all gone, except a very small portion of foundation, and that No. 2 was not broken to foundation, but near it; while as to Nos. 3, 5, 6, and 7, he says that the wall had completely disappeared, no trace of foundation apparently remaining; from all of which it may be reasonably inferred that when he speaks of foundation he is merely referring to the bottom layer of stone as it rested on the sand.

That such a wall successfully withstood for eighteen years, save on the one occasion in 1914, the inroads of the Atlantic can only be accounted for, in my opinion, by the inference to which the evidence on the point, as I shall immediately show, seems fairly to lead, that the defendant had throughout this period lived up at least to the measure of his obligation to repair; but during all the years it was in effect a mud wall cased in stone, its constitution was being constantly undermined owing to the absence of foundations, and, while patching and repairing might and did postpone the evil day, it was liable to go under an extra strain, and finally collapsed from disease in its heart. I am by no means satisfied that if the Judge at the trial had dealt with this case in relation to the actual wall and not the wall as described in the specification, he would have found for the plaintiffs in the sum of £185 or at all, but as his judgment assumes the existence of a wall which, when originally built, was a practically solid block capable of resisting wind and weather, it cannot be supported; and if the evidence as a whole, when fairly construed, is at least equally consistent with the wall having collapsed from defective construction as from default to repair, the plaintiffs have failed in their proof.

I am also of opinion that the plaintiffs have failed to discharge the onus of proving that the breaches that occurred in this wall in September, 1918, were occasioned by default of defendant in his obligation to repair. It must be remembered in this connexion that each of the plaintiffs went to trial with the clearest intimation by the statement of defence that he was confronted, in addition to the averment of failure to give notice, with a denial by the defendant of any default in repair, and their attitude at

the trial in this respect is certainly significant. No evidence was given by any of them either as to any want of repair at any period during the preceding nine months of 1918, nor as to any lack of opportunity for observation or inspection. Mooney, one of their expert witnesses, had not seen the wall from May, 1917, until after the flooding complained of, and the one and only piece of evidence on the subject was given by their other expert Roche, who stated that he had inspected the wall on two occasions in 1918 prior to the flooding, one being in February and the other in June. He gave no evidence as to any want of repair in February, but did say it was out of repair in June or July. But the important matter in connexion with this evidence is his statement that his visit in June or July was for the purpose of litigation, as it entitles us to assume that he communicated to the plaintiffs, who employed him, the results of his inspection, and we know that no litigation, threatened or actual, ensued. For these reasons I am of opinion that the case of the plaintiffs failed by reason of their omission to give notice of the want of repair they alleged. It also failed, in my opinion, through want of proof that the breaches in the wall, through which some portion of the flooding was carried on the lands, were due to any actionable default to repair. I have already pointed out that while the only evidence as to this given by or on behalf of the plaintiffs was Roche's statement as to the condition of the wall in June or July, 1918, he did not allege any want of repair upon his visit in the previous February; while he also admitted that the breaches which had been repaired prior to 1918 held good in the September floods. I now turn to the evidence on this point given for the defence, and, in marked contrast, it is clear and precise. The defendant swore that he had seen the wall on March 18th, 1918, and that it was in excellent order then. This statement, coupled with Roche's admission that the repairs executed prior to 1918 held good in September, removes from the controversy all suggestions as to any antecedent want of repair, and narrows the issue to Roche's visit in June or July. As to this, defendant's steward proved that he repaired any defects that he found during 1918 prior to the flooding, and that on the Friday before, that is, September 20th, the wall was perfectly

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right. This evidence was quite consistent with the wall being in need of repair on some day in June or July previous. It was given in the presence and hearing of all the plaintiffs, and no one of them was recalled to contradict it in any particular. In these circumstances I certainly will not assume it to be false, and, being uncontradicted, it disposes, in my opinion, of the case for the plaintiffs on this issue, of which the onus of proof rested on them. Finally, it has been argued that in this branch of the case the evidence of Mr. Hickson as to the original construction of the wall leads to the inference that the breaches which occurred in September, 1918, were the necessary consequence of some failure to repair.

Mr. Hickson was the engineer who had been employed by the defendant to superintend its erection in 1900. We were told by Mr. Conner that his services had been retained for this litigation by one of the plaintiffs; but, be that as it may, he was not called by either side, but was sent for and examined by the Judge, in the exercise of a power which, it has been held, should only be used in special and exceptional circumstances. The result in this case does not encourage its repetition; it contributed to the misconception which lies at the root of the judgment given in favour of the plaintiffs. His evidence in effect was that the wall when originally built was a stone wall, with puddled clay inside, and a stone-sloped pitching on the seaside. The stones were pointed, and the joints were hammer-spalled, that is to say, small stones were driven in between the joints and pointed with cement. He stated that, having regard to its weight and size, the wall when originally constructed was fit to resist any storm if properly repaired, and that it resisted all right until 1914. He added that the hammer-spalling would require constant attention, and that an annual outlay of from £50 to £60 a year was essential to proper repair. I do not wish to criticize too closely these statements, having regard to the way in which Mr. Hickson intervened in the trial. Suffice it to say that he did not profess to have seen the wall since 1914, and his statement that as originally built it was fit to resist any storm may be reconciled with a belief that the contractor had built in accordance with the specification, but is entirely inconsistent with the description, as

given by the witnesses for the plaintiffs, of the wall as actually constructed with the entire absence of cement, and with the proved and accepted fact that a breach of fifteen feet in width was solely due to original defective construction.

Further, I am not satisfied that the evidence affords sufficient justification for the award by the Judge to each plaintiff of substantially one-half of the damages alleged, nor can I accept his finding that the sea during these high tides in September was "a fairly rough sea" as a reasonable description of the conditions which prevailed. These spring tides prevailed for four days, from September 21st to September 24th; and Mr. Roche swore that on this latter date he saw signs of "a tremendously high sea" shortly before, and that a large quantity of seaweed had been cast on the land, partly above the wall and partly through the breaches. The plaintiff Parker admitted that there was a gale, but not a bad gale, while the defendant swore that when he inspected the place on October 4th he saw large quantities of seaweed inside the wall and on the top of the coping, and his steward proved that the waves were dashing over the wall. A tremendously high sea which swept over the top of a wall seven feet in height can scarcely be fitly described as "fairly rough." Mr. Roche further proved that two of the breaches were due to faulty construction and the absence of foundation, and that one of them measured fifteen feet. He attributed one-half of the flooding to these two breaches. In addition, account has to be taken of the sea carried over the wall as well as underneath it, of the vast quantity that must during the four days have passed through the openings of the three accommodation roads, through the two sluices, and especially through and over the lands of Slattery and Flaherty, which lie below the wall and are without protection against the inroads of the Atlantic, and which, when flooded, as they were to a depth of some feet, must have forced back the waters of the drain on the lands higher up. No accurate description was given of the level of the lands, and I have failed to find from the evidence any data from which any estimate could fairly be made as to the proportion of the flooding to be attributed to the breaches in the wall, so far as they were alleged to have been caused by want of repair; and still less can I find anything but the merest

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speculation as to the proportion of the damage to be attributed to them, or anything to negative the conclusion that the tremendous volume of water that was carried over and under the wall, or which swept through a breach of fifteen feet, or through the mouths of the roads and over the unprotected lands of Slattery and Flaherty, would have caused the same amount of damage if the other breaches in the wall had never occurred. The Judge reports that he reduced the damages that may have occurred through possible flooding from the lands at the south which were below the wall and had no rampart to resist the sea. But such flood was, in my opinion, not merely possible, but certain, and must have been the largest contributor to the damage; and I have failed to find any evidence at the trial which enabled any estimate to be formed as to the proportion of the damage to be attributed to this cause, nor does he appear to have made any allowance for the vast quantities carried over and under the wall or through the sluices and mouths of the roads.

If this question as to the amount of the damages had been the only issue in the case, the defendant would, in my opinion, have been entitled to a new trial; but, as I hold that the case for the plaintiffs has failed by their omission to give notice of the want of repair, and that they also have failed in the onus of proof that there was any default in repair or that the collapse of the wall resulted therefrom, the defendant is entitled to have judgment entered for him.

O'CONNOR M.R.:—

The defendant is the owner of a landed estate which is known as Fenit Island, situate in Co. Kerry, on the south-west coast. It is bounded by the Atlantic, and thus exposed to the winds and tides of the ocean. The lands are low-lying, and at high tides are liable to floods. This is particularly so when the wind is strong from the south-west.

The plaintiffs are the occupying tenants of that part of the property which lies on the seashore. The holdings of some are immediately on the sea front, while others are in the immediate vicinity, but situate only a short distance from the shore. All these holdings are liable to be flooded at exceptionally high tides.

In the year 1900 the defendant, for the purpose of protecting the lands from the encroachments of the sea, caused a wall to be built at his own expense for about three-quarters of a mile along the coast. This wall is on the sea side seven feet high, on the land side five feet high, and four feet broad. It is carried along the front of all the holdings which are actually on the seashore, with the exception of the plaintiff Murphy's holding, which is the most southerly. The wall covers only a portion of the shore of this holding, so that the remaining portion is unprotected. The defendant did not originally assume any liability to maintain the wall, but subsequently, when the plaintiffs applied to the Land Commission to have fair rents fixed, they were fixed by the Court on the basis that the landlord should keep the wall in repair. It was admitted that this threw on the defendant the same obligation as he would have incurred if he had entered into a covenant with each of his tenants to keep the wall in repair. It was for a breach of this obligation that the actions were brought. In the month of September, 1918, there was a very high tide, accompanied by a strong westerly or south-westerly wind. The result was that a great force of water was brought to bear on the sea wall; several breaches were made in it, and the plaintiffs' holdings were submerged and serious damage was done. It is alleged that the failure of the wall to resist the tide was owing to the neglect of the defendant to keep it in proper repair.

This is only a statement of the case in outline, but it is sufficient for my present purpose, which is to try the validity of a legal defence raised by the defendant.

He has pleaded that the plaintiffs never gave him any notice that the sea wall was out of repair prior to the occurring of the injuries complained of. It is admitted that notice was not given. If the plea is a good one, it is a good defence to the entire claim.

The contract as expressed has no mention of notice. In terms it is simply a contract to keep in repair. Now, it is a received canon of construction that a contract must be interpreted as expressed. It ought not to be added to or detracted from. There is, no doubt, an exception to this general rule. The nature of the contract may be such that it is impossible to carry it out, or highly unreasonable to expect it to be carried out, except under

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certain conditions, which, though not expressed, must be assumed to have been understood. For instance, the seller of a motor car agrees with the purchaser to keep it in repair for twelve months from the date of sale. This does not mean that the seller is to inspect the car every day or every week to see whether it requires repairs, and if it does to execute them. It necessarily means that the car will be repaired whenever the purchaser gives notice that something has gone wrong which requires to be made good. Any other construction would be so unreasonable that the Court would imply a condition that notice of want of repair should be given before a liability was incurred. I will take another case: a landlord contracts to keep the drains of his tenant's house in order. Here, again, the condition of notice must be implied, because the knowledge of the condition of the drains lies with the tenant, and the necessity of repairs only becomes apparent by inconvenience suffered by himself.

The general principle lying at the root of such cases was laid down in this way in *Vyse* v. *Wakefield* (1):—"The rule to be collected from the cases seems to be this, that where a party stipulates to do a certain thing in a certain specified event which may become known to him or with which he can make himself acquainted, he is not entitled to any notice, unless he stipulates for it; but when it is to do a thing which lies within the peculiar knowledge of the opposite party, the notice ought to be given him." This is a rule of common sense, aiding the reasonable construction of contracts. Applying this principle to the present case, is it essential to the reasonable performance of the contract in question that notice of want of repair should have been given to make the defendant liable? The observation of the sea wall is just as much open to the defendant as to the plaintiffs, and the opportunity for observation is one that in his own interest he ought to avail himself of, because he knows that it is a kind of structure which requires constant attention, and that neglect of small repairs may lead to expense which otherwise would be saved. The necessity for implying the condition of notice may be tested in another way. If it is to be implied, we must consider what might reasonably have happened if the defendant before he

(1) 6 M. & W. 442, at p. 452.

entered into the contract proposed to make it an express term that notice of the necessity for repairs should be given. If such a proposal were made, I can easily see a reason for objection by the tenant, who would naturally say, why should I be obliged to give you notice? You have the same opportunity for observation that I have. I know nothing about sea walls. You built this sea wall; you know more about its structure and composition than I do. You will be the best judge whether it wants repairs or not, and, further, you ought in your own interest to keep it under systematic observation, because immediate attention to the smallest breach or collapse may save you from very heavy expenditure. No one could say that such an objection to the landlord's proposal would have been unreasonable, nor could anyone say that the landlord would have acted foolishly if he recognized its force. How, then, can it be maintained that the condition as to notice must be implied? We were referred to many cases in which it was held that it was a condition of liability on a contract to keep in repair that the covenantor should have got notice of the want of repair, but, in my opinion, the decisions went on the principle that in order to give a reasonable construction to the contract it was absolutely necessary to imply that which was not expressed, but which must have been understood between the parties.

In *Makin* v. *Watkinson* (1) lessors, of whom the defendant was one, covenanted with the plaintiff (the lessor) that they would at all times during the demise at their own expense keep the main walls, main timbers, and roofs of the buildings demised in good and substantial repair. The action was brought for a breach of this covenant, and the defendant pleaded that the plaintiff gave no notice to the lessors of any want of repairs. A demurrer was entered to this plea, and it was set down for argument. The plea was held good on the general principle I have mentioned. Channell B. said:—"We must . . . look at the question apart from direct authority and upon general principles. And looking at it in this way *Vyse* v. *Wakefield* (2) is, to some extent, an authority, for it warrants the proposition that, when a covenant would, according to the letter, be an unreasonable one, words not inconsistent with the words used may be interpolated to give it a

(1) L. R. 6 Ex. 25. (2) 6 M. & W. 442.

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reasonable construction. This proceeds on the assumption that the contracting parties were reasonable men, and intended what was reasonable. If, however, the language of the covenant is clearly inconsistent with the words sought to be added, I agree that, however absurd the covenant may be, it cannot be varied. Now, here repairs are to be done to the exterior of the premises, as to which it is just possible that the lessor might, by observation, acquire a knowledge of their necessity. But the main timbers of the building, which must be within its carcase, and the roofs are to be kept in repair; and of the repairs required for these he could have no knowledge without notice. He could not enter to see the condition of those parts, even though, independently of his obligation under the covenant, it might be of great consequence to him to be acquainted with it. Here, therefore, by the rule of common sense, which is supported by the case of *Vyse* v. *Wakefield* (1), we ought to import into the covenant the condition that he shall have notice of the want of repair before he can be called on under the covenant to make it good." Bramwell B's. judgment is on the same lines. He said:—"I am also of opinion that the plea is good. To hold it to be so, we must hold the defendant's covenant to be a covenant to repair on notice. I have the strongest objection to interpolate words into a contract, and think we ought never to do so unless there is some cogent and almost irresistible reason for it, arising from the absurdity of the contract if it is read without them." Martin B. differed. He thought that the words of the contract ought to be strictly adhered to, and that as the covenant was a covenant to repair without any condition, there was no reason for construing it as a covenant to repair on notice.

Here, then, we have authority for the proposition that words are only to be interpolated into a contract, that a condition to a contract absolute in form is only to be implied, when the contract as actually expressed is unreasonable and contrary to common sense; and the dissenting judgment of Martin B. goes even further in the same direction. The observation is obvious that there was nothing unreasonable—nothing contrary to common sense—in the assumption by the defendant in the present action of

(1) 6 M. & W. 442.

the duty of keeping the sea wall under observation, and repairing it from time to time as it exhibited the necessity for repairs.

The next case is the *London & South-Western Railway Co.* v. *Flower & Others* (1). There the defendants were by an Act of Parliament under an obligation to the plaintiffs to execute certain works on the plaintiffs' lands according to the plans, drawings, and specifications approved of by the plaintiffs' engineer, and to maintain these works according to such approved plans under the superintendence and to the reasonable satisfaction of the plaintiffs' engineer. Some years after the erection of the works, certain repairs became necessary. The plaintiffs executed these repairs without giving any notice to the defendants that the repairs were necessary, and claimed to be reimbursed their outlay by the defendants. It was held that the defendants were not liable because they did not get notice. This case, however, turned on the special provisions of the Act, and particularly on the clause which provided that the work was to be done under the superintendence and according to the plans of the plaintiffs' engineer. Brett J. also relied on the circumstance that the structure to be repaired was in the exclusive possession of the plaintiffs, and that it might be out of repair in such a way that the want of repair might not be ascertainable upon an examination such as the defendants could make. There is no doubt a passage in the judgment of Denman J. which, taken without qualification, seems to support the proposition that all covenants to keep in repair must be subject to the condition that notice of the necessity for repairs must be given. He said: "One of the first principles of natural justice is, that, where a party is required, whether by a private contract or by an Act of Parliament, to do an act the doing of which is contingent upon the necessity for it arising at some uncertain time, before he can be charged with a breach of duty in not doing the act, he must have notice that the time for doing it has arrived, so as to have an opportunity of performing his obligation." But this observation must be taken in connexion with the facts of the particular case.

The next case is *Manchester Bonded Warehouse Co.* v. *Carr* (2). That was an action by the lessors against a lessee for rent and

(1) 1 C. P. D. 77.
(2) 5 C. P. D. 507.

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breaches of covenant. The lessee counter-claimed for breach by the lessors of a covenant by them to keep the walls, roof, and main timbers of the demised premises in good and substantial repair and condition. The plaintiffs relied on want of notice of the need for repairs, and it was held that they were not bound to repair until notice was given. The action was tried before Lord Coleridge C.J., and was adjourned to the full Court for the determination of certain questions of law—inter alia, the obligation of the lessee to give notice of want of repair to the lessors. The judgment of the Court was read by Lord Coleridge. The special point was dealt with very shortly as follows:—"We are of opinion that the plaintiffs are not liable to pay any damages to the defendant by reason of the express covenant binding the plaintiffs to keep the walls, roof, and main timbers of the building in repair. Before the building fell the plaintiffs had no notice of any danger or want of repair, and such notice is essential to render them liable to be sued on their covenant: *Makin* v. *Watkinson* (1), approved and followed in *London & South-Western Railway Co.* v. *Flower*" (2). The decision, therefore, was based on the principles laid down in *Makin* v. *Watkinson* (1), and does not rule cases to which these principles cannot be applied.

The same point came up in *Hugall* v. *M'Lean* (3). The lessee sued the lessor for breach of covenant to keep the drains of the demised house and premises in good repair. Judgment was entered for the defendant on the ground that there was no proof of want of repair, and that the condition was owing to a structural defect not covered by the covenant. The defence of want of notice was raised, and Wills J. said that it was unnecessary to decide the point, but gave his opinion upon it. So far as I understand his judgment, he laid it down as a universal proposition that a landlord cannot be sued on a covenant to repair until he is noticed by the tenant of the defects complained of, apart altogether from the reasoning in *Makin* v. *Watkinson* (1). But his remarks were obiter dicta. This case was taken to the Court of Appeal (4), and it would seem that the defence of structural defect in some way dropped out, and that the defence of want of notice

(1) L. R. 6 Ex. 25.
(2) 1 C. P. D. 76.
(3) 53 L. T. N. S. 94.
(4) 33 W. R. 588.

became material, so that there is the judgment of the Court of Appeal on the point. In effect it is this, that in every case of a covenant by a lessor with his lessee to keep demised premises in repair he does not become liable to repair until he is noticed by the tenant of the defects complained of; but, as I understand the judgments, they went upon this, that the want of repair to demised premises lies within the peculiar knowledge of the lessee, and that in common justice to the lessor he ought to get notice. The special facts of the case required that condition, because the structure which required repair was the drainage system of the house, a defect in which would necessarily become known to the lessee. Therefore it was held that the lessor should have got notice, even though the lessor had the means of knowledge, he having had a right of entry for the purpose of inspecting the drain. Such general observations as were made in the judgments must be taken in connexion with the very special facts of the case. They ought not to be applied without discrimination to a case in which the facts are wholly different.

The obligation of a lessee to give notice to his lessor of want of repair before a breach of covenant by a lessor to keep demised premises in repair occurred came up again in *Torrens* v. *Walker* (1), and Warrington J. laid it down as a general proposition that a covenant by a lessor to repair the external wall of a house is a covenant to repair on notice and not otherwise; but I think that anyone reading his judgment must recognize that it was based on the principle of *Makin* v. *Watkinson* (2), and that the necessity for notice did not arise out of the mere relationship of lessor and lessee, but rested on the principle that a reasonable construction of the contract required the interpolation of a condition as to notice. His quotation from *Makin* v. *Watkinson* (2) establishes this. I infer from the judgment in this case that there was no thought of extending it to a case where the principle did not apply. The latest reported case bears out the view which I take. In *Melles & Co.* v. *Holme* (3), the owners of a house let it in flats, covenanting to keep the outside of the demised premises, and the roofs, walls, and drains thereof in good and tenantable condition.

(1) [1906] 2 Ch. 166. (2) L. R. 6 Ex. 25.
(3) [1918] 2 K. B. D. 100.

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One of the pipes carrying the water from the roof became choked, with the result that the rooms of one of the tenants were flooded, and damage was done. In an action against the lessor for breach of covenant, want of notice was relied on as a defence. The trial was in the County Court, and the Judge held that notice was necessary. There was an appeal to the King's Bench Division, by whom the judgment of the County Court was reversed. Salter J., in giving judgment, said:—"In some cases, no doubt, there must be read into a covenant by a landlord to repair a condition that the tenant must give him notice of the want of repair before he can be entitled to complain of it. The principle of that rule is thus laid down by Bramwell J. in *Makin* v. *Watkinson* (1): 'When a thing is in the knowledge of the plaintiff, but cannot be in the knowledge of the defendant, but the defendant can only guess or speculate about the matter, then notice is necessary.' This was also put very clearly by Collins M.R. in *Tredway* v. *Machin* (2): 'That rule rests upon the principle that the landlord is not the occupier of the premises, and has no means of knowing what is the condition of the premises unless he is told, because he has no right of access to the demised premises, whereas the occupier has the best means of knowing of any want of repair.' To justify the Court in reading into a covenant a condition which is not there, there must be very strong ground for their doing so." All these points were brought out by Mr. FitzGerald, counsel for some of the tenants, in his very clear and convincing argument. Now, I ask myself, are there any strong grounds for reading into the contract in the present case a condition as to notice to the landlord? The need for repair was just as much apparent to the landlord as to the tenant; and he was vitally interested in making repairs in order to save a large expenditure. Further, the sea wall was not on or even immediately adjacent to some of the holdings which it was designed to protect. Indeed, I doubt very much whether the sea wall is on any of the holdings. Presumably the holdings before the building of the wall were bounded by high-water mark; but the fact that the sea wall was built by the lessor, that he exercised control over it, and the subsequent fixing of fair rents, which must have been only for the

(1) L. R. 6 Ex. 25. (2) 91 L. T. 310.

land within the sea wall, all go to support the view that the holdings are bounded by the sea wall, and do not include it. The tenants were not occupiers of the sea wall. Let it further be considered what notice should be given by each tenant. Was he only bound to give notice of the state of repair of the section of the wall bounding his own holding? or was he bound to give notice as to the condition of the entire wall? If the former, the notice and compliance with it might not serve for much, because he might suffer just as much damage from a breach in a section of the wall bounding another holding. If the latter, he would not have the right of inspection from the land side in order to get the full knowledge on which the notice should be given. If he entered on his neighbour's holding, he would be a trespasser. Then, take the case of a tenant whose holding did not touch the wall at all. He would not have the right of inspecting any part of it from the land side.

On the whole, I see no reason for reading into the agreement to keep in repair the words "on notice to the lessor."

In arriving at this conclusion I am not acting at variance with any of the decisions which I have cited. They, no doubt, establish the general rule that as between landlord and tenant notice must be given to the landlord of want of repair before a breach of covenant to repair takes place, but that is because in general the want of repair is within the knowledge of the tenant and not of the landlord. Here, however, we are dealing with a very special case—such a case as was certainly not in the minds of the learned Judges in *Hugall* v. *M'Lean* (1) and *Torrens* v. *Walker* (2). In my opinion these cases do not rule the present one.

There is this further element in the case we are dealing with. The defendant, as one would expect, undertook the supervision of the wall. We have this in effect from himself. He had an agent or bailiff named Kelly, who lived in the locality, and the defendant stated that Kelly had undertaken to look after the wall; and Kelly's evidence is that he inspected the wall once a week. For what purpose did he inspect it? Not, I should say, for the purpose of building it up when it was knocked down, but to see whether it needed repairs to keep it from being knocked down; to

(1) 53 L. T. N. S. 94. (2) [1906] 2 Ch. 166.

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prevent damage to the lands from flooding, not to allow the lands to be flooded in the first instance, and to make the repairs afterwards. I agree with Gibson J., who ruled that on this point alone the defence of no notice failed.

I must now approach the question whether there was evidence that the defendant did, in fact, allow the wall to get into disrepair, and in dealing with this part of the case I regret that we have not a fuller note of the evidence.

The first witness examined for the plaintiff was an engineer named Mooney. Having explained the structural defects of the wall, he said: "The wall was originally of stone and mortar. All the mortar is washed out of it, and the stones are quite loose . . .; no binding whatever; the pitching seems to have been united with mortar . . .; the general condition of the wall is not good . . . .; it is only fair; it would not stand any rough weather at all." Now here is evidence of neglect—"all the mortar washed out," "stones quite loose." It was admitted that the pitching is an important part of the wall, and when the witness said, "It seems to have been united with mortar," that means that the mortar had disappeared and was not replaced. Then there is Mr. Roche's evidence, given with the utmost fairness and discrimination. He recognized that the defendant was not responsible for the parts of the wall which were badly constructed, being laid on sand, but he said that other parts gave way owing to want of repair, manifested by—1, holes in the pitching, and, 2, holes in the wall. On cross-examination he says that in July, 1918, he saw holes in the pitching and holes in the wall and considerable cracking—evidence not contradicted.

Then Murphy, one of the plaintiffs, said, "They never do anything to the wall till the breach occurs." Then there was the significant observation of the defendant's steward Kelly, who said on cross-examination, "I cannot say if there was anything spent on the wall in 1917 or 1916." No doubt there was evidence, but not of an overwhelming character, offered by the defendant that the wall was in good repair. I need not go into this, because all the plaintiffs had to show in order to maintain the verdict was that there was evidence on which the Judge at the trial was entitled to act. I hold that there was sufficient evidence. The

case was also made that, even though the breaches made in the wall were owing to non-repair, the damage or the main part of it did not result from that. It was pointed out—and truly—that the sea wall stopped short at a particular point, and that below that point the sea was bound to come in, so that, whether the wall stood or not, the lands would have been flooded by the high tides, and also that the sea would have come in through breaches, which were owing to structural defects, for which the defendant is not responsible.

This is no doubt so, but surely the more inlets there were for the advance of the tide the greater must have been the quantity of water which flooded the land; and the defendant is responsible for the extra flooding, though not responsible for the flooding which was caused by inlets which he could not control. The Judge at the trial tells us he recognized this, and for this reason cut down the damages. The amount arrived at was not calculated scientifically, and I do not believe that an army of experts would have enabled the Court to arrive at an absolutely accurate figure. What is called rough justice was done—the nature of the case did not admit of anything else. The defendant's neglect made him liable for damages incapable of being estimated with accuracy. He cannot escape for that reason, and he should be satisfied with a result which may be unscientific but practical. I see no reason for disturbing the judgment of the Court below.

MOLONY C.J.:—

Six actions were brought by John P. Murphy and five other tenants of the defendant claiming damages for breach of the defendant's contract to maintain and keep in repair a sea wall adjoining the plaintiffs' lands at Fenit, in the County of Kerry. The actions were consolidated by order dated the 18th December, 1919, and were tried as one action by Lord Justice O'Connor, sitting without a jury, at the Spring Assizes, 1920, for the County of Kerry.

It appeared that each of the plaintiffs was a judicial tenant of the defendant, and that their fair rents were fixed upon the basis that it was a condition of the tenancy that the landlord should keep in repair as theretofore the sea wall on the western side of the

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townland from A to B on the map recorded. It further appeared that this wall was begun by the defendant in 1899, and finished in 1900, and that there had been previously a loose stone wall which had been washed away.

The defendant lives in London, and he had last seen the wall in March, 1918, when he described it as having been in excellent order. A man named Kelly looked after the wall for the defendant, and Kelly said in his evidence that he inspected the wall once a week, and that when he saw it in September, 1918, on the day before the storm which damaged the wall, it was perfectly right. None of the plaintiffs gave any evidence as to the wall requiring repair in September, 1918, and the plaintiffs rested their case as regards negligence mainly on the evidence of Mr. John Mooney, the engineer, and Mr. Redmond Roche, the valuer. It was admitted on all hands that no notice was given to the defendant of want of repair. When the defendant heard of the damage, he immediately returned to Ireland, and started to do the necessary repairs, which were executed in about five weeks at a cost of £84. The defendant, in his defence, pleaded specifically that the plaintiffs never gave any notice to the defendant that the said sea wall was out of repair prior to the occurring of the injuries complained of. It was suggested in the King's Bench Division that this point was not made at the trial, but it appears that at the close of the plaintiffs' case Mr. H. D. Conner, senior counsel for the defendant, asked for a non-suit, and although the grounds upon which this was asked are not stated by the learned Judge, I am prepared to accept Mr. Conner's statement that the two grounds upon which he relied were: 1, that there was no evidence of any breach of duty; and, 2, that there was no evidence of damage resulting from breach of duty. It is clear that there was no evidence of a breach of duty if the duty only arose on notice being given, and no such notice had in fact been given. It, therefore, becomes vital in this case to determine whether the plaintiffs were under an obligation to give notice of want of repair to the defendant before he could be held liable for the consequences of non-repair? The lands of four of the plaintiffs—John P. Murphy, John Murphy, junr.; Robert Parker, and Thomas M'Carthy—immediately adjoin the sea, and the wall is measured in on their respective

holdings. Sullivan's and Moynihan's lands do not adjoin the sea, and the water is alleged to have gone on their lands through and from the lands of another plaintiff. They all, however, lived within a short distance of the wall, which it was their obvious interest to have maintained as an effectual protection, and it would not be unreasonable to expect that when they were upon the spot and the defendant lived at a distance, the defendant should get notice of want of repair.

Having carefully considered the case, I think that the law did require such notice to be given, and that the plaintiffs having failed to give it their cause of action did not arise, and that the non-suit or direction for the defendant asked for at the trial ought to have been granted. The dictum of Mansfield C.J. and Gibbs C.J. in *Moore* v. *Clarke* (1) is applicable to the present case. These eminent Judges laid down—but in the particular case it was only a dictum—that "the lessor may charge the lessee without notice; for the lessor is not on the spot to see the repairs wanting; the lessee is, and therefore the lessee cannot charge the lessor for breach of repairs without notice, for the lessor may not know what repairs are necessary." In *Makin* v. *Watkinson* (2) an action was brought by a lessee against his lessor upon a covenant by the lessor to keep the main walls, main timbers, and roofs of the demised premises in repair, and it was held that the action must fail unless the lessor had received notice of the want of repair. That was a decision of Baron Channell and Baron Bramwell, from which Baron Martin dissented. Bramwell B., referring to the plea which relied on want of notice, and stating that to hold it good they must hold the defendant's covenant to be a covenant to repair on notice, proceeded as follows:—"I have the strongest objection to interpolate words into a contract, and think we ought never to do so unless there is some cogent and almost irresistible reason for it, arising from the absurdity of the contract if it is read without them. Does such a reason then exist here? I think it does. I think that we are irresistibly driven to say that the parties cannot have intended so preposterous a covenant as that the defendant should keep in repair that of which he has no means of ascertaining the condition.

(1) 5 Taunton, 96.
(2) L. R. 6 Ex. 25.

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The lessee is in possession; he can say to the lessor, 'You shall not come on the premises without lawful cause,' and to come for the purpose of looking into the state of the premises would not be a lawful cause. If the lessor comes to repair when no repair is needed, he will be a trespasser; if he does not come, he will, according to the plaintiff's contention, be liable to an action on the covenant if repair is needed, and will be liable, not only to the cost of repair, but to consequential damage for injury to chattels caused by want of the repairs he had no opportunity of effecting. This is so preposterous that we ought to hold that the parties intended the covenant to be read with the qualification stated."

In *London and South-Western Railway Co.* v. *Flower* (1) the doctrine of *Makin* v. *Watkinson* (2) was declared to be as applicable to an Act of Parliament as to an ordinary contract, as was stated by Denman J. in his judgment: "One of the first principles of natural justice is that where a party is required, whether by private contract or by an Act of Parliament, to do an act the doing of which is contingent upon the necessity for it arising at some uncertain time, before he can be charged with a breach of duty in not doing the act he must have notice when the time for doing it has arrived, so as to have an opportunity of performing his obligation."

In *Manchester Bonded Warehouse Co., Ltd.*, v. *Carr* (3) both the last-mentioned cases were considered by the King's Bench Division (Lord Coleridge C.J. and Grove and Lindley JJ.). The covenant in that case was very similar to that in *Makin* v. *Watkinson* (2), and the unanimous judgment of the Court, which was delivered by Lord Coleridge C.J., contained the following passage:—"We are of opinion that the plaintiffs are not liable to pay any damages to the defendant by reason of the express covenant binding the plaintiffs to keep the walls, roof, and main timbers of the building in repair. Before the building fell the plaintiffs had no notice of any danger or want of repair, and such notice is essential to render them liable to be sued on their covenant: *Makin* v. *Watkinson* (2), approved and followed in *London and South-Western Railway Co.* v. *Flower* (1). If we are correct in this respect, it will follow that neither before nor after

(1) 1 C. P. D. 76. (2) L. R. 6 Ex. 25. (3) 5 C. P. D. 507.

the fall of the building was there any breach by the plaintiffs of their express covenant to keep its walls, etc., in repair. If, indeed, the defendant can show unreasonable delay in the rebuilding by the plaintiffs, he will be entitled to such damages, if any, as such delay may have caused him; and if the case is re-tried, this point will be open to him."

Similarly, if the plaintiffs in the present case could have shown that the defendant unreasonably delayed to repair the damage after he had got notice of it, the defendant would undoubtedly have been liable in damages; but no suggestion of this kind was made, as the defendant appears to have returned from London and taken immediate steps to have the repairs effected.

All these cases came to be considered by the Court of Appeal in the case of *Hugall* v. *M'Lean* (1). In that case an action was brought by a tenant against a landlord for breach of an agreement to keep drains in repair, and the jury found that neither party knew of the defective condition of the drains before the damage occurred, and that the plaintiff had not, and the defendant had, the means of knowing. It was, nevertheless, held that the defendant was not liable. This case is considerably stronger than the present, because the jury found that while the plaintiff, the tenant, had not the means of knowing that the drains were in a defective condition, the defendant, who was the landlord, had the means of knowing, although as a matter of fact he did not know. Brett M.R. (afterwards Lord Esher) in his judgment said: "The terms of the agreement in the present case are substantially the same as those of the covenant in *Makin* v. *Watkinson* (2), and as those of the Act of Parliament in *London and South-Western Railway Co.* v. *Flower* (3); and, therefore, I am of opinion that we must give the agreement the same interpretation as was given in those cases. It is the case of an agreement drawn in the form of a common covenant in a lease, and the meaning of such a covenant was settled by a decision given nearly fifteen years ago (*Makin* v. *Watkinson* (2)). That decision has been followed in other cases, and no doubt many covenants in leases have been drawn on the faith of the interpretation placed on the covenant in that case. This being so, I think

(1) 53 L. T. N. S. 94. (2) L. R. 6 Ex. 25. (3) 1 C. P. D. 76.

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that even if we disagreed with the view adopted in *Makin* v. *Watkinson* (1), we should still be bound to give the same interpretation to the agreement in this case; but, in my opinion, it is impossible to doubt that the reasons given for the interpretation placed on the covenant in *Makin* v. *Watkinson* (1) are unanswerable."

All these cases were considered by Warrington J. (now Warrington L.J.) in *Torrens* v. *Walker* (2), where he held that a covenant by a lessor to keep the outside walls of the demised premises in repair would be construed as a covenant to repair on notice, and that there can be no breach of such a covenant until the lessor has notice of want of repair. In that case the covenant on the part of the lessor was limited to the outside of the premises, and, of course, the lessor might, by observation, have noticed the want of repair.

Since the argument our attention has been drawn by counsel for the plaintiffs to two cases—namely, *Citron* v. *Cohen* (3) and *Melles* v. *Holme* (4). In my opinion both these cases were rightly decided, but they are of no assistance to us on the points which have to be considered in the present case.

I agree with the Lord Chancellor's criticism of the construction of the wall; and, of course, it has not been contended that the defendant in any event was bound to do more than keep it in reasonable repair, having regard to its original faulty construction. It seems to me impossible to attach liability to the defendant for not repairing when the plaintiffs gave no evidence of having observed anything actually wrong prior to the occurrence, and the defendant took the precaution of having the wall examined by his steward Kelly once a week, and when Kelly swears that he was there the day before the storm, and could see no part of the wall that required repair, and it was, in his opinion, then perfectly right. To make the defendant liable in such circumstances would be to make him an insurer, which undoubtedly he is not.

In my opinion the appeal should be allowed, and the judgment entered at the trial be set aside, and judgment entered for the defendant with costs.

Solicitors for the plaintiffs: *T. J. Liston, J. O'Connell.*
Solicitor for the defendant: *Matthew Byrne.*

R. ST. J. C.

(1) L. R. 6 Ex. 25.
(2) [1906] 2 Ch. 166.
(3) 36 T. L. R. 560.
(4) [1918] 2 K. B. 100.

IN RE CLANCARTY, A BANKRUPT.

Pim J.
1921.
Feb. 18.
April 11, 22.
Appeal.
June 14.

Bankruptcy — Order and disposition — Mortgage of life assurance policy — Second mortgage — No notice to insurance company of second mortgage — Equity of redemption — Irish Bankrupt and Insolvent Act, 1857 (20 & 21 *Vict. c.* 60), *s.* 313—"*Goods or chattels.*"

In 1905, C., the owner of a policy of assurance on his own life, mortgaged it, together with certain lands, to the company by which it had been granted. The company retained the policy, and noted the mortgage in their books. In April, 1907, C. mortgaged the policy and the lands to B., who gave no notice to the company till November, 1920. In June, 1907, C. was adjudicated bankrupt, and in July, 1907, notice of the adjudication was given to the insurance company by the assignees in bankruptcy. In 1915 the other property comprised in the mortgages having been sold, the insurance company were paid the amount due on foot of their mortgage, and handed the policy to the assignees. In 1920 the assignees surrendered the policy to the insurance company, and received its surrender value. B. applied for payment of the amount due to him on his mortgage out of the money representing the surrender value.

Held, by the Court of Appeal (1), affirming Pim J., that the equity of redemption in the mortgage was "goods and chattels" within the meaning of the Irish Bankrupt and Insolvent Act, 1857 (20 & 21 Vict. c. 60), sect. 313, and was at the date of the bankruptcy "in the possession, order, or disposition of the bankrupt" by the consent and permission of the true owner.

MOTION ON NOTICE.

On 1st August, 1905, the National Mutual Insurance Company granted to the Earl of Clancarty two policies of insurance on his own life for £14,000 and £3,000 respectively; on the same day he mortgaged the two policies, with certain lands, to the company; on 5th August, 1905, the company noted in their books the mortgage of the policies.

On 19th April, 1907, the Earl mortgaged the policies, with the lands, to Duncan Blair.

(1) Before SIR JAMES CAMPBELL C., and RONAN and O'CONNOR L.JJ.

Pim J.
1921.
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On 24th June, 1907, the Earl was adjudicated a bankrupt; on 5th July, 1907, notice of the adjudication was given by the assignees in bankruptcy to the insurance company.

In August, 1915, the other property included in the mortgages having been sold, the insurance company were paid out of the proceeds of sale the amount due to them on foot of their mortgage, and handed to the assignees the policy for £3,000. In July, 1920, the assignees surrendered the policy to the insurance company, and were paid its surrender value.

On 19th October, 1920, Blair gave notice of his claim to the assignees in bankruptcy.

On 29th October an order was made by the Court under the Bankruptcy and Insolvent Act, 1857, sect. 313, for the sale of the policy.

On 11th November, 1920, Blair gave notice of his mortgage to the insurance company.

Blair now applied for payment out of the moneys representing the surrender value of the policy of the amount due to him on foot of his mortgage.

M'Gonigal K.C., for the applicant:—

At the date of the bankruptcy the policy was not in the possession, order, or disposition of the bankrupt with the consent of the true owner within the Irish Bankrupt and Insolvent Act, 1857 (20 & 21 Vict. c. 60), s. 313: *Fenelon* v. *Baker* (1); *Freshney* v. *Carrick* (2); Halsbury Encyclo., vol. ii, 171. The equity of redemption in the policy was not "goods or chattels" within the section: *Johnson* v. *Diprose* (3).

Herbert Wilson K.C., for the assignees in bankruptcy:—

The claim is statute-barred; real estate was included in the mortgage; the claim against the lands is barred, and therefore the claim on the covenant: *Sutton* v. *Sutton* (4); *Fearnside* v. *Flint* (5). It was not decided in *Fenelon* v. *Baker* (1) that notice by the second mortgagee is unnecessary for his protection. In that case there was one mortgagee only, who became trustee for

(1) 1 Ir. Jur. N.S. 1.
(2) 1 H. & N. 653.
(3) [1893] 1 Q. B. 512.
(4) 22 Ch. D. 511.
(5) 22 Ch. D. 579.

another. The right to redeem is a chose in action, and therefore "goods and chattels," and it was in the order, possession, and disposition of the bankrupt.

M'Gonigal K.C., in reply :—

The assignees are trustees for all creditors, and the creditor's claim is not statute-barred : *Ex parte Ross* (1) ; *Re General Rolling Stock Company* (2). Even if the debt is barred, the claim can be enforced against the policy : Macgillivray, Insurance Law, 514 ; *London and Midland Bank* v. *Mitchell* (3) ; *Re Hancock* (4). No Statute of Limitations applies to a mortgage of personal estate : *Mellersh* v. *Brown* (5).

PIM J., having stated the facts, proceeded :—

There was in the bankrupt at the time of his adjudication an equity of redemption in the policies, which, even at that time, had a very considerable value. This equity of redemption, to which the applicant had a legal right, remained in the order and disposition of the bankrupt, inasmuch as the applicant had given no notice of his mortgage.

Mr. M'Gonigal, on behalf of the applicant, quoted two cases, one in Ireland and the other in England, as authority for his contention that the interest in the policies was in the first mortgagee, and, therefore, that there was nothing in the bankrupt which could pass to the assignee.

I will deal with the English case first. It is a case of *Freshney* v. *Carrick* (6). In that case a trader assigned certain goods by way of bill of sale to the plaintiffs, and due notice thereof was given under the Bills of Sale Act. Previously thereto he had made an absolute assignment of the same goods to one Ward, with power to repurchase them at a future time. It was held by the Court that Ward was the real owner of the goods, and that the goods having been left with the bankrupt, they were in his order and disposition with the consent of Ward, the true owner. The judgments in the case are not very clear,

(1) 2 Glyn & J. 330.
(2) 7 Ch. A. 646.
(3) [1899] 2 Ch. 161.
(4) 57 L. J. Ch. 793.
(5) 45 Ch. D. 225.
(6) 1 H. & N. 653.

Pim J. 1921. *In re* CLANCARTY.

but, so far as I can understand them, I think I have correctly summarized them. I fail to see how that case is any authority for Mr. M'Gonigal's contention.

The Irish case is somewhat different, and very much more in the applicant's favour. It is a case of *Fenelon* v. *Baker* (1), decided by Lord Chancellor Maziere Brady in the year 1855. In that case the insolvent assigned a policy of insurance for £500 to a man called Sparks to secure a debt of £82. Sparks gave notice of the assignment to the company, and subsequently, at the request of the insolvent, deposited the policy with a man called John Taylor Crooke, to secure a debt due by the insolvent to Crooke. No notice was given of this second mortgage (I assume it to have been a second mortgage, but indeed the facts are somewhat obscure). The representatives of Crooke were the respondents in the case. The usual application was made to have the policy held to be in the order or disposition of the insolvent at the time of the insolvency, and the Lord Chancellor stated that in his opinion the policy was not in the order or disposition of the insolvent, and that in consequence of the notice served by Sparks on the insurance company no creditor making inquiry could be misled as to some disposition of the policy having been made.

Now it will be noted that that decision only deals with the ownership of the policy, and the fact of there being an interest left in the insolvent under the equity of redemption does not appear to have been considered at all. In so far as the case decided that the policy itself was not in the order and disposition of the insolvent, it is clearly correct, but, although the representatives of Crooke were successful, it is no real authority for the applicant's present contention, for the point was not even raised. The case is an old one, and there have been great developments in the interpretation of the 313th section since that time, and I cannot take it to be a decision binding upon me in this case. The point is still open whether an equity of redemption is not an interest which passes to the assignee, and which, if at the moment of the bankruptcy it is in the possession of the bankrupt, is not caught by the 313th section as being "goods or chattels" in the bankrupt's possession, order, or disposition.

(1) 1 Ir. Jur. N. S. 1.

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But Mr. M'Gonigal has further argued that, even if an equity of redemption were something which was in the order or disposition of the bankrupt, it could not be held to come within the words "goods and chattels" within the meaning of those words in the section. Now, there have been a great many decisions on the meaning of the words "goods and chattels," both under the English Acts and under our own Acts. Choses in action have been held, again and again, to come under the words; so have bills of exchange and promissory notes, shares in companies, policies of insurance, annuities, furniture, money, notes, and generally all kinds of personalty, even though the bankrupt's interest was merely a reversionary one. It has even been held that the right to publish a paper came within these words, and I would like for a moment to refer to the curious case in which that was held. It is a case of *Longmans* v. *Tripp* (1). I quote it, not only for the facts, but for the statements contained in the judgments. It appears that a printer in Bristol named William Bulgin, being indebted to the plaintiff for goods sold to him, assigned to him his interest in a certain newspaper, then printed and published in Bristol aforesaid, called "The Bristol Mercury." There was no assignment of the presses, types, or other implements for printing, but merely of the right to print a newspaper under the title of "The Bristol Mercury." Bulgin continued, with the permission of the plaintiff, to print and publish the newspaper down to the time of his becoming a bankrupt in the month of February, 1804, and the question then arose whether the interest in the newspaper was not within the order or disposition of the bankrupt with the consent of the true owner. Sir James Mansfield, the Chief Justice, said, dealing with the argument that this interest was not "goods and chattels" within the meaning of sect. 11, c. 19, of the statute 21 Jas. 1: "It is to be remembered that all things are to be largely and beneficially expounded under that statute for the advantage of the bankrupt estate." And further on he said: "As to the question whether the right to this newspaper passed under the assignment, can any case be found in which it has been held that property of this description would not pass under a commission of bankrupt?"

(1) 2 Bos. & P. N. R. 67.

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And Mr. Justice Chambré said: "The words are 'goods and chattels.' To be sure, this interest is not tangible, but it would be a very narrow construction to confine the operation of the statute to tangible property. It is true that the future labour of the bankrupt cannot be transferred, but where there is some sort of interest, it appears to me that it may be transferred."

Now, what is an equity of redemption? The cases to which I am about to refer all deal with an equity of redemption in land, but, "mutatis mutandis," I think they all equally refer to an equity of redemption in a policy of insurance. Lord Hardwicke, in a case of *Casborne* v. *Carfe* (1), says that "an equity of redemption has always been considered an estate in the land, for it may be devised, granted, or entailed with remainders, and such entail and remainders may be barred by a fine and recovery, and cannot be considered as a mere right only, but such an estate whereof there may be a seisin. The person, therefore, entitled to an equity of redemption is considered as an owner of the land, and a mortgage in fee as personal assets."

Vice-Chancellor Sir John Leech, in the case of *Lloyd* v. *Lander* (2), says that an equity of redemption is not an estate but an interest. This case came before the Court of Bankruptcy, and I shall have to refer to it again later on.

Chief Baron Hale, in *Pawlett* v. *Attorney-General* (3), says "a power of redemption is an equitable right inherent in the land, and binds all persons in the post or otherwise"; and he adds, "and it is of such consideration in the eye of the law that the law takes notice of it, and makes it assignable and devisable."

Now, which of these three definitions of an equity of redemption may be the more correct I do not pause to consider. Possibly they are all three correct. But one thing is quite clear from the decisions, namely, that an equity of redemption, whether it be called "an estate," or "an interest," or an "equitable right," is a real thing of the nature of property which will vest in the assignee. And, to quote the words of Sir John Leech in the case of *Lloyd* v. *Lander* (2), "the equity of the bankrupt no longer remains in him, but it is actually or potentially in his

(1) 1 Atk. 603. (2) 5 Madd. 282. (3) Hardres 469.

assignees"; and, again, "the equity of redemption is not an estate but an interest, and may well be considered as substantially vested in the assignees before a bargain and sale."

Now, this "interest," or "equitable right," or "estate," was in the bankrupt in this case at the date of his bankruptcy. If the applicant here had given notice under sect. 3 of the Policies of Assurance Act, 1867 (30 & 31 Vict. c. 144), this equity of redemption, by force of that notice, would no longer have been in the order and disposition of the bankrupt, but would have become the property of the second mortgagee, leaving in the bankrupt another equity of redemption subject to the two earlier mortgages.

I have come to the conclusion that this equity of redemption in the policies of insurance is an interest or equitable estate in the said policies, and comes within the meaning of the words "goods or chattels" in the 313th section; and, agreeing with the statement of Mr. Justice Chambré in *Longmans* v. *Tripp* (1), that "where there is some sort of interest, it may be transferred,' I hold that it vested in the assignee at the date of the bankruptcy. I further hold that it was in the possession of the bankrupt at the date of his bankruptcy, with the consent of the true owner, the present applicant. That being so, the application must fail, and the declaration already made must remain.

It has been suggested that, inasmuch as what was ordered to be sold by order of the Court was the policy itself, and not the equity of redemption, the section has not been complied with, and that I should grant the application. I am not of that opinion. The order is a mere formal one, necessary as a preliminary to the declaration which has been made. The policy had, before the order was made, been surrendered, and the surrender value paid into Court. In any case, the order was for the sale of the policy, and it governs all things therein comprised, including the equity of redemption.

This decision concludes the case, but as it has been argued before me that, even if the order and disposition section did not apply, the Statute of Limitations prevents the applicant from succeeding, I will deal shortly with this contention. I am of

(1) 2 Bos. & P. N. R. 67.

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opinion that the Statute of Limitations does not apply. In the first place, I am satisfied that the statute was stopped running by the proceedings in bankruptcy, and, secondly, even if it had not been stopped running, that there is no statute of limitations dealing with policies of insurance. Mr. Herbert Wilson has suggested that the doctrine of *Sutton* v. *Sutton* (1) and *Fernside* v. *Flint* (2) would rule this case, inasmuch as the mortgage deed conveyed land belonging to the bankrupt as well as the policies of insurance. I do not think so. Where the remedy against the land is lost, it may well be that the remedy under the covenant is also gone; but I cannot extend that to holding that because the remedy against the land is gone, the remedy against the policy of insurance is also gone. That would be to extend the doctrine far beyond what the cases authorize.

M. G. E.

June 13, 14. The applicant appealed to the Court of Appeal.

M'Gonigal K.C., *Blood K.C.* (with them *Devitt*), for the appellant:—

Section 313 of the Act of 1857 can operate only where there is a true owner and a reputed owner, and the order for sale must be an order for the sale of specific goods or chattels. The bankrupt was not the reputed owner, and the appellant was not the true owner of this policy, within the meaning of the section, at the date of the bankruptcy. Under the section there can be only one true owner. In this case the true owners were the first mortgagees, and the fact that they had perfected their title enured to the benefit of the appellant. *Fenelon* v. *Baker* (3) is a clear authority in our favour. In *Freshney* v. *Carrick* (4) the second mortgagee did not succeed, because the first mortgagee had agreed to leave the bankrupt in possession of the mortgaged goods. [Other authorities cited: *In re Wallis* (1); *In re Power* (2);

(1) 22 Ch. D. 511.
(2) 22 Ch. D. 579.
(3) 1 Ir. J. N. S. 1.
(4) 1 H. & N. 653.
(5) [1902] 1 K. B. 719.
(6) 11 L. R. Ir. 93.

In re Hickey (1); *Bradley* v. *James* (2); *In re Mackay* (3); *Colonial Bank* v. *Whinney* (4).]

We submit that the order for sale made on October 29th, 1920, is first justified by section 313. The appellant was only mortgagee of an equity of redemption; but the order for sale obtained by the assignees ex parte was an order for the sale of the policy simpliciter, a policy which had been actually surrendered without any reference to the equity of redemption. Our submission is that on the form of the order for sale the respondents constituted the first mortgagees, the true owners. These orders must be strictly drawn and construed, because section 313 is, as has been frequently held, a confiscatory section. The order for sale must be specific and not general: *Quartermaine* v. *Bittleston* (5).

H. Wilson K.C. and *V. Wilson*, for the respondents, were not called upon.

The Court affirmed the judgment of Pim J. for the reasons given by him.

Solicitors for the appellant: *J. L. Scallan & Co.*

Solicitors for the respondents: *Bennett Thompson* and *M'Neill.*

C. L.

(1) I. R. 10 Eq. 117.
(2) I. R. 10 C. L. 441.
(3) [1915] 2 I. R. 347.
(4) 11 A. C. 426.
(5) 13 C. B. 133, at p. 157.

K. B. Div.
1921.
April 26.

HIGGINS *v.* WILLIS (1).

Destruction of property in martial law area—Jurisdiction to hear action for, durante bello—Stay of proceedings.

So long as a state of war exists, an action for damages for alleged wrongful destruction of property by military forces in a martial law area cannot be tried; but the plaintiff has a right to have his case proceeded with so soon as a state of war no longer prevails. An order was made, accordingly, staying such an action until further order.

MOTION that an action brought against an officer of the Crown for damage done by his order in a martial law area be stayed on the ground that the Court had no jurisdiction, durante bello, to entertain such an action.

The action was brought by Anthony Higgins against Colonel Willis to recover damages for wrongful destruction of the plaintiff's property by the defendant and others, acting by his order and under his authority and control.

It appeared from the affidavit of the plaintiff that on 19th of January he was served with a notice, signed by the defendant, stating that, as Military Governor of Cork, he had ordered the destruction of plaintiff's house on the ground that on the 15th of January, 1921, fire was directed from it on the forces of the Crown. The allegation of firing from his premises was denied by the plaintiff in his affidavit.

The defendant, in an affidavit, stated that he ordered the carrying out of the acts complained of, and that the said acts were necessary and proper for military purposes, and for the suppression of the rebellion; and Sir Nevil Macready, in an affidavit, stated that the defendant acted in the execution of orders from his military superiors, and that, as Commander-in-Chief of His Majesty's Forces in Ireland, he accepts responsibility.

Babington K.C. and *Murphy K.C.* (with them *Lipsett*), for the defendant:—

The Civil Courts have no jurisdiction to adjudicate upon acts done by the military forces in the field while and where a state of war exists. It has been decided that a state of war exists in

(1) Before MOLONY C.J., DODD and PIM JJ.

the area where the plaintiff's house was situate, and it was as an act of military necessity that the house was destroyed. The action is frivolous and vexatious and an abuse of the process of the Court, and should be stayed and dismissed with costs.

P. Lynch K.C. and *O'Byrne*, for the plaintiff:—

The action is not frivolous or vexatious. The plaintiff has suffered a wrong, and is entitled to redress at the hands of a jury. In the absence of an Act of Indemnity, the plaintiff's remedy cannot be denied, and his action is, therefore, not an abuse of the process of the Court, and should not be stayed or dismissed.

MOLONY C.J., having stated the facts, proceeded:—

Yesterday, in delivering the judgment of the Court in *Rex* (*Ronayne and Mulcahy*) v. *Strickland* (1), I laid it down that we had no jurisdiction, durante bello, to inquire into or pass judgment on the conduct of the Commander of the Forces in repressing rebellion, and I further stated that when the war was over the acts of the military during the war, unless protected by an Act of Indemnity, could be challenged before a jury, and that in that event even the King's command would not be an answer if the jury were satisfied that the acts complained of were not justified by the circumstances then existing, and the necessities of the case.

We are quite satisfied that this action is not frivolous or vexatious within the meaning of the authorities, and that we have no power to dismiss it.

The further question arises whether it would be right to allow the case to proceed at the present moment, in the face of the judgment which we delivered yesterday that a state of war exists in the City of Cork. It is clear upon the authorities that so long as that state of war exists this action cannot be tried; while the plaintiff has a right to have his case tried so soon as a state of war no longer prevails.

In this state of facts, we think the proper order to make is to stay the action until further order, costs of both parties of the motion to be costs in the cause.

Solicitors for the plaintiff: *O'Connor & Co.*

Solicitor for the defendant: *James Mecredy.*

H. H.

(1) Ante, p. 317.

Appeal. 1921.

June 8.

KIRBY AND ANOTHER *v.* KERRY COUNTY COUNCIL (1).

Malicious injury—Premises burglariously broken into—Goods selected and stolen—Other goods damaged—Compensation.

A number of persons burglariously entered a shop, tossed about a certain quantity of stock in making a selection, and took away articles of considerable value for their own use and benefit. The County Court Judge awarded compensation in respect of the damage done to the shop and to the goods, but refused compensation in respect of the stolen goods. On appeal this decision was affirmed by Molony C.J. (Tralee Assizes).

On case stated, the Court of Appeal (1) *held* that the applicants were entitled to compensation in respect of the value of the goods stolen as well as for the damages to their premises and stock.

CASE STATED by Molony C.J. at the Kerry Spring Assizes, 1921, under the provisions of sect. 5 of the Local Government (Ireland) Act, 1898.

The case stated was as follows:—

1. The applicants in this case claimed to recover the sum of £1,900 9*s.* 4*d.* compensation for malicious injuries sustained by them in having their drapery premises at Tralee, in the county of Kerry, broken into and damaged, and a large quantity of goods destroyed and taken away.

2. The case was heard before the County Court Judge at Tralee on the 11th January, 1921, and he awarded the sum of £312 in respect of the damages done to the premises and to goods, but he refused compensation in respect of the property taken away.

3. The applicants appealed to the Judge of Assize, and the case came before me at the Munster Spring Assizes, 1921. I held that the County Court Judge was right, and affirmed his decree, but on the application of the applicants agreed to state a case for the opinion of this Court.

4. The applicants carry on business at Tralee as general drapers, and on the 15th November, 1920, a number of persons

(1) Before SIR JAMES CAMPBELL C., and RONAN and O'CONNOR L.JJ.

broke into their shop, stayed there for a long time, tossed about a certain amount of stock in the shop in making a selection, and having selected articles of considerable value carried them away in lorries.

5. Thomas Kirby, one of the applicants, was examined on their behalf. He lives over a chemist's shop some distance away from his own shop, but in view of the latter premises, and he swore as follows:—

On the 15th November, 1920, at half-past 12 a.m., the chemist's shop underneath my dwelling-house was smashed. One of the small lorries came down, and the persons in it broke into the chemist's shop and remained there for an hour. Half an hour afterwards forty or fifty men came down the streets walking. They climbed up lamp-posts and put out the lights, and left the place completely dark. I heard them tearing down the gate of my shop [photograph put in evidence showing shop front]. I heard several heavy bangs and glass falling. They remained there for some time. I could see them with searchlights. They were dressed in civilian clothes, and wore soft hats; no uniform. I saw them drawing away the stock from my place. The police barracks is 150 yards from my shop. They were an hour and a half or two hours in my place. The lorries seemed to be a short distance below my place, as well as I could judge. At 5 a.m. three lorries left, coming from the direction of the police barracks and up the street. At 6 a.m. I went out to investigate, and found gate of door broken open and one side completely smashed. I tried to fasten the door, and left it in that position until Mr. Liston (solicitor for applicants), Sergeant Murphy, and the County Inspector came. Stock was strewn round the shop as far as the door, and stock was also heaped behind the counter.

He then gave particulars of the loss which the applicants sustained, and which I do not think it necessary to transcribe.

6. It was admitted that the sum of £312 awarded by the County Court Judge was sufficient to cover the damage done to the premises and the goods in the shop; but it was contended that the applicants were also entitled to recover the value of the goods which Mr. Kirby swore he had seen the raiders take away in the lorries.

7. I was not quite satisfied with the evidence of Mr. Kirby, and inquired for the County Inspector and Sergeant who had seen the premises. I was informed that the County Inspector had since died; but I examined Sergeant Murphy, and found that he was unable to give me any evidence as to who were the

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persons who caused the damage, or indeed throw any light upon the matter beyond stating that at that time lorries were frequently passing in the night.

8. I was of opinion that this was a case in which several persons burglariously entered the premises, and took away goods for their own use and benefit; and that, while on the authority of *M'Dowell* v. *The Corporation of Dublin* (1) the damage done to the premises and the stock therein was recoverable, the goods which the raiders took away after careful selection was not the subject of compensation for malicious injury, and that *Tyler & Sons* v. *The County Council of Cork* (2) did not extend to the ordinary depredations of a thief or body of thieves.

If I am wrong in this, and the goods taken away are the subject of compensation, I assess the compensation in respect of such goods at £700, and the award in such case is to be increased to £1,012, with £24 9*s.* 3*d.* costs and expenses in the County Court, and £21 15*s.* costs and expenses of the hearing before me. If the value of the goods removed is not to be taken into consideration, the decree of the County Court Judge is to be affirmed without any costs of the hearing before me.

M'Elligott K.C. and *B. Roche*, for the appellants:—

The goods taken away are the subject of compensation. We submit that this case is governed by *Tyler* v. *Cork Co. Council* (2) and *Congested Districts Board* v. *Mayo Co. Council* (3).

SIR JAMES CAMPBELL C.:—

We are all of opinion that this case is concluded by *Tyler's Case* (2) and the *Congested Districts Board* v. *Mayo Co. Council* (3), and accordingly we shall make a decree for the sum of £1,012 mentioned by the Lord Chief Justice.

Solicitor for the appellants: *T. J. Liston.*

C. L.

(1) [1903] 2 I. R. 541. (2) Ante, p. 8.

(3) 55 I. L. T. R. 4.

COLCLOUGH, APPLICANT, *v.* THE COUNTY COUNCIL OF THE COUNTY OF WEXFORD, RESPONDENTS (1).

Appeal.
1921.
April 27.

Local Government—Criminal Injury—Compensation—House destroyed by means of unlawful act—Malicious Injuries (Ireland) Act, 1853, sect. 1 (16 & 17 Vict. c. 38, s. 1).

An unoccupied house, the property of the applicant, was taken possession of by trespassers, who utilized it for manufacturing explosives to be used for unlawful purposes. Whilst the trespassers were so engaged, an explosion occurred which wrecked the house.

Held, by the Court of Appeal, that the damage to the house was "sustained . . . by means of" an unlawful act within the meaning of sect. 1 of the Malicious Injuries (Ireland) Act, 1853, and that the applicant was entitled to compensation.

CASE STATED by O'Connor L.J. at the Spring Assizes, 1921, for the County of Waterford, as follows:—

The application was for damages for the malicious destruction of a small dwelling-house, which was unlet at the date of its destruction. On the night of Tuesday, the 12th October, 1920, a number of persons, to the number of at least five, whose identity is unknown, were in the said house without the knowledge or permission of the applicant or anyone on her behalf. These persons were unlawfully engaged in the manufacture of bombs for use in ambushes or other armed attacks on the forces of the Crown. During this process there was an explosion which killed several of the parties engaged in the manufacture, and wrecked the house. The explosion was accidental, and was not malicious or wanton. I held that the applicant was not under the circumstances entitled to claim compensation, and I dismissed the application, but I stated this case at the instance of the applicant for the purpose of determining whether I was right or wrong in so holding. If I am wrong, the compensation should be assessed at £150, with £50 to cover the costs and expenses in the County Court and before me, said sum to be levied off the county at large.

(1) In the Court of Appeal, before SIR J. CAMPBELL C., MOLONY L.C.J., and RONAN L.J.

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Addendum.—I delivered no judgment, but in the absence of appearance by the respondents, I think it right to indicate the train of thought that led me to my conclusion. The test in my opinion is, would the parties in the house be responsible in a Criminal Court for the explosion? The explosion, no doubt, occurred during the unlawful process, and may in a loose sense be said to have been caused by it. The process was not in itself a malicious damage, nor was the explosion the natural and probable result of the process. On the contrary, it was improbable, unexpected, and accidental. On the principle of *Reg.* v. *Faulkner* (1), I think it clear the parties would not be criminally responsible. Suppose several persons are engaged in driving motor cars, which are being used in illegal and treasonable gun-running. One of them runs down and kills a man without intending to do so. He would not be guilty of manslaughter unless the circumstances were such as to render him guilty apart from the illegality of the transaction in which he was engaged; and even if he was guilty of gross negligence, and therefore guilty of manslaughter, I consider that the county would not be responsible, for the act of running down was not a necessary incident of the unlawful project.

W. G. Gibson K.C. and *F. Matheson*, for the applicant:—

The Malicious Injuries (Ireland) Act, 1853, is one of the Acts of Parliament incorporated in the first schedule to the Local Government (Ireland) Act, 1898. This case comes clearly within sect. 1 of the Act of 1853, where the words are "unlawfully, wantonly, or maliciously" destroy, etc., not merely "maliciously or wantonly," as in sect. 135 of the Grand Jury (Ireland) Act, 1836. If, then, the damage to the applicant's house resulted from an unlawful act, it is sufficient to enable her to recover. That the acts of the persons who occasioned the damage were unlawful is clear. They were not only trespassers, but were contravening the provisions of the Explosive Substances Act, 1883 (46 & 47 Vict. c. 3, sects. 2 & 3).

"Unlawful" does not necessarily mean "criminal," and we have not to prove an offence for which an indictment would lie. Although it is not necessary for us to so contend, we say that this was wanton and malicious damage.

(1) I. R. 11 C. L. 8.

[The following cases were cited and discussed:—*In re Borrowes* (1); *M'Dowell* v. *Corporation of Dublin* (2); *In re Earl of Kenmare's Presentment* (3); *Woodley* v. *Cork Co. Council* (4); *Reg.* v. *Pembliton* (5); *Reg* v. *Faulkner* (6). Reference was also made to Stephen's Digest of the Criminal Law, 6th ed., p. 167.]

There was no appearance on behalf of the respondents.

SIR JAMES CAMPBELL C.:—

The applicant in this case was the owner of a house which at the date in question was unoccupied. The vacant house was taken possession of unlawfully by a number of persons who utilized it as a place for the manufacture of explosives, and whilst they were so engaged a serious explosion occurred, causing death to certain of those engaged in the process of the manufacture of the explosives, and practically demolishing the house. The question thus arises whether the applicant as owner of the house is entitled to compensation in respect of its destruction under any of the provisions of what is known as the Malicious Injuries Code.

The application having been dismissed by the County Court Judge, it came on appeal before O'Connor L.J., who affirmed the dismiss; but, thinking the case to be one deserving of further consideration, he has stated a case for the opinion of this Court. The view which appears to have been taken by the learned Lord Justice was that the applicant was not entitled to compensation, inasmuch as it could not be said that the explosion was brought about by the intentional act of the trespassers, and could not accordingly be considered as coming within the definition of a malicious or wanton act. I do not think that this question necessarily arises for decision in the present case; and, as it may require to be more fully considered in some future case, I do not propose to express any opinion upon it at present. It is enough to say that, in my judgment, the learned Lord Justice did not give sufficient consideration to the provisions of the Malicious Injuries (Ireland) Act, 1853. The words in sect. 1 of this Act are: "If

(1) [1900] 2 I. R. 593.
(2) [1903] 2 I. R. 541.
(3) 26 I. L. T. R. 93.
(4) [1910] 2 I. R. 29.
(5) L. R. 2 C. C. R. 119.
(6) I. R. 11 C. L. 8.

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any persons in Ireland, unlawfully, riotously, or tumultuously assembled together, shall hereafter unlawfully, wantonly, or maliciously destroy or demolish, or otherwise damage or injure, any dwelling-house, outhouse," &c.; thus differing somewhat from sect. 135 of the Grand Jury (Ireland) Act, 1836, where the words used are "maliciously or wantonly." In cases coming within the Act of 1853 accordingly it is sufficient to show that the damage was occasioned by an unlawful, as distinct from a malicious or wanton, act, and what we have to consider in the present case is, first, were the acts of those who were assembled in this house unlawful, and, secondly, was the damage to the house sustained "by means of" such unlawful acts. As to the first of these questions, the answer is clear. These persons had taken wrongful possession of the house in the absence of its owner; and they were engaged there in an illegal pursuit, namely, the manufacture of explosives for a sinister and unlawful purpose. Was, then, the damage brought about "by means of" these illegal acts? It is impossible to suggest what else occasioned it. It arose, and can only have arisen, from the manufacture of the explosives. I am not prepared to say, as the learned Lord Justice appeared to have considered, that the explosion and the resulting damage to the house were not the natural and probable results of the manufacture of explosives. I should have thought that in the case of persons who were not experts, and who were engaged in manufacturing explosives in a place which was prima facie unsuitable, or at least not intended for such a pursuit, the chances of an explosion, and of damage resulting therefrom, were very great. Be that as it may, I am satisfied that the circumstances of this case bring it within the section of the Malicious Injuries (Ireland) Act, 1853, to which I have referred, and that the applicant is entitled to compensation. I expressly refrain, however, from expressing any opinion as to whether the acts occasioning the damage were "malicious" or "wanton" so as to bring the case within the Grand Jury (Ireland) Act, 1836.

MOLONY L.C.J. and RONAN L.J. concurred.

Solicitors for the applicant: *Norris Goddard & Davidson.*

R. ST. J. C.

WHEELER & CO., LTD., *v.* JOHN JEFFREY & CO. (1).

(1920. No. 5683.)

K. B. Div. 1920. Nov. 16. — *Appeal.* 1920. Dec. 10.

Practice—Contract by correspondence—Acceptance—New and material term—Service out of the jurisdiction—R. S. C., 1905, *Order XI, r.* 1 (*f*).

In the course of correspondence an Irish firm agreed to act as agents for a Scotch firm, but no reference having been made to any date upon which the agency under the contract was to commence, the Irish firm wrote on June 10th, 1911: "We will agree to carry on your agency as from the 1st July next on the terms and conditions specified in our joint correspondence." To this communication the Scotch firm replied on June 12th: "We . . . note with pleasure that you are agreeable to carry on the agency . . . as from the 1st prox. on the terms and conditions specified in our joint correspondence." The Irish firm instituted proceedings against the Scotch firm, claiming damages for breach of contract.

Held, by the King's Bench Division, that the mention in the letter of June 10th of a date upon which the agency was to commence did not introduce a new term, and that, as the contract was made or entered into in Ireland, leave to issue and serve a writ out of the jurisdiction ought to be given to the Irish firm.

Held, by the Court of Appeal (reversing the King's Bench Division), that the letter of June 10th introduced a new and material term, and that the acceptance of that new and material term having been by a letter written in Scotland, leave to issue a writ for service out of the jurisdiction could not be given.

MOTION by the defendants that an order made by Powell J. on July 21st, 1920, giving liberty to the plaintiffs to issue a writ against the defendants for service out of the jurisdiction, be set aside on the ground that the contract in respect of which the action was brought was not made or entered into in Ireland, or to be performed in Ireland. The plaintiffs, Wheeler & Co., were aerated water manufacturers and exporters, carrying on business in Belfast. The defendants, John Jeffrey & Co., were brewers in Edinburgh, Scotland.

The plaintiffs' claim was for damages for breach of a contract in writing contained in letters passing between the defendants and the plaintiffs from May 20th to June 10th, 1911, whereby the defendants agreed to employ the plaintiffs as their agents.

(1) In the King's Bench Division, before PIM and GORDON JJ.

K. B. Div. 1920. WHEELER v. JEFFREY.

In the year 1911 negotiations took place between the plaintiffs' firm, who had a long-standing and extensive business connexion on the West Coast of Africa, and the defendants. The latter were anxious to open up the West African trade for the sale of their Munich, Pilsener, and Lager beers, and with this end in view approached the plaintiffs.

On May 20th, 1911, the defendants wrote to the plaintiffs appointing them sole agents for their beers for the West Coast of Africa. The letter stated the terms, adding: "We will agree to allow you the sum of £25 annually towards office expenses in Liverpool . . . We shall be glad to receive your acceptance of this offer in due course." After further correspondence, which contained no reference to any date upon which the agency under the contract was to commence, the plaintiffs wrote to the defendants on June 10th: "We will agree to carry on your agency as from the 1st July next on the terms and conditions specified in our joint correspondence." On June 12th the defendants wrote to the plaintiffs: "We are in receipt of your favour of the 10th inst., and note with pleasure that you are agreeable to carry on the agency for our Lager, Pilsener, and Munich beers for the West Coast of Africa as from the 1st prox. on the terms and conditions specified in our joint correspondence."

E. S. Murphy K.C. and *Dockrell*, for the defendants.

Serjeant Hanna and *Tobias*, for the plaintiffs.

PIM J.:—

The sole question in this case is whether the plaintiffs by their letter of 10th June, 1911, in which they accepted the defendants' offer contained in their earlier letters, attempted to add a term to the contract contained in said letters by mentioning the 1st July as the date on which they would take up the agency. It is admitted, and indeed it could not be disputed, that, if nothing had been said about the date of commencement, the contract would have been complete, and, in such case, a part of the contract would have been that the agency was to commence within a reasonable time—a time which, if necessary, might have been fixed by the Court.

It has been argued, on the one hand, that the mention of a date was tantamount to the addition of a new term, inasmuch as the defendants might not have agreed to it; and, on the other hand, that it was a mere suggestion, and not to be taken as altering the contract.

The suggestion was reasonable, and was treated as reasonable by the defendants in their letter of the 12th June, in which there is not even a hint that the contract had thereby been altered.

We have been referred to two cases which are in point. One of them is so like the case before us as to be almost indistinguishable from it. I refer to the case of *Clive* v. *Beaumont* (1), a decision of Vice-Chancellor Sir J. L. Knight Bruce. That was a suit for specific performance of an agreement for the sale of a leasehold house in Grafton Street, London, and the first of the two letters which contained the contract was as follows:—

27*th October*, 1845.

Gentlemen,—I am willing to take the remainder of Mr. Clive's term of No. 18 Grafton Street at the same rent, and will purchase the fixtures and furniture to the amount of £100 by valuation in the usual way, the furniture to be selected by myself.

I am, Gentlemen,
Yours, etc.,
HENRY BEAUMONT.

The reply of the house agents acting on behalf of the plaintiff was as follows:—

30*th October*, 1845.

Sir,—We are instructed by our principal, the Rev. Archer Clive, to accept the terms proposed by you in your letter of 27th ulto. for his house No. 18 Grafton Street.

We hope to give you possession by the half-quarter day.

We are, Sir,
Your obedient Servants,
W. & E. SNELL.

It was agreed on behalf of the defendant in that case that the statement that possession would be given at half-quarter day was the introduction of a new term to the contract; but the Vice-Chancellor held, first, that "these words were not intended to

(1) 1 De G. & Sm. 397.

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operate and did not operate as a qualification of the contract or a qualification of the acceptance"; and, secondly, that "if they had operated as a qualification of the contract or a qualification of the acceptance, the circumstances which afterwards occurred were more than sufficient to do away with any possible effect that could be supposed to arise from it."

I am of opinion that in this case the offer to take up the agency on the 1st July (an eminently reasonable date) was never intended to operate, and did not operate, as a qualification of the contract, but was merely in the nature of a suggestion, and that, even if it could be contended that the offer had so operated, the letter of the defendants of the 12th June, together with the letters which followed, were more than sufficient to do away with any possible effect that could be supposed to arise from such operation, for the defendants thereby accepted the suggested date without a hint that the contract had been added to, changed, or in any way affected, and acted throughout on that assumption. The case of *Simpson* v. *Hughes* (1) was also quoted. It was a decision of the Court of Appeal in England on appeal from Mr. Justice Romer. It is not as strong as the case of *Clive* v. *Beaumont* (2), but *Clive* v. *Beaumont* (2) was quoted to the Court, and no disapproval was expressed by any of the Lords Justices. In *Simpson* v. *Hughes* (1) no date was suggested; but Simpson in his letter accepting the contract added the words, "I would like to know from what time Mr. Hughes wishes the purchase to date."

It was argued that the inquiry showed that the matter of the date was left open for negotiation, and excluded the inference that the completion was to be within a reasonable time, but the Lords Justices held that the words had no such effect. "The letter of November 8th," said Smith L.J., "contains a clear acceptance of a clear offer. . . . If it had stopped there, the completion would have been within a reasonable time. The law would import that it should be within a reasonable time; but, having bound himself hard and fast, Simpson goes on to ask as to the date of the purchase. The paragraph in which he does so is no part of the contract at all." But if it was not, how does the case differ from the case before us, for Hughes in reply might

(1) 66 L. J. Ch. 334. (2) 1 De G. & Sm. 397.

have fixed a time which was not suitable to Simpson? It seems to me that a contract which is completed and fixed, and is not affected by an inquiry as to date, cannot be opened and rendered incomplete by the mention of a date in reply. If, in fact, in such a case the parties cannot agree on a date, the Court will fix a reasonable date for them.

In the same case Lindley L.J. said: "The inquiry was made simply as a matter of courtesy. If a reasonable time had been fixed, Simpson could not have got off his bargain, because I think that he was bound by his letter to complete within a reasonable time." That means that if Hughes in reply to the inquiry had suggested a reasonable date, Simpson would have been bound. If he had not, the Court would fix a reasonable date. If that be good law, I fail to see how that case differs from the case before us, for the plaintiffs, it is admitted, did suggest a reasonable date. The application should, in my opinion, be dismissed with costs.

GORDON J.:—

I regret I cannot take the same view as my brother Pim. The sole question on this motion is, was the contract entered into in Ireland? and that really resolves itself into the question, was the date from which the agency under the contract was to commence a term of the contract, or was it a mere statement, which in no way entered into or affected the contract? That there was a contract is not in dispute; only the place where it was entered into is in controversy.

The matter began by a conversation or negotiations in Belfast between the representative of the defendants, who carry on business in Scotland, and the plaintiffs, who carry on business in Belfast. This was followed by a letter from defendants to plaintiffs on 20th April, 1911, setting out the terms of their conversation, and confirming them on their part. A correspondence then ensued in which the terms were further discussed, and substituted terms proposed by plaintiffs and defendants respectively. In this correspondence no reference was made to any date upon which the agency under the contract was to commence, and ultimately, on 10th June, 1911, the plaintiffs wrote from Belfast:

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"We will agree to carry on your agency as from the 1st July next on the terms and conditions specified in our joint correspondence." And to this the defendants replied from Edinburgh on 12th June, 1911: "We are in receipt of your favour of the 10th inst., and note with pleasure that you are agreeable to carry on the agency for our Lager, Pilsener, and Munich beers for the West Coast of Africa as from the 1st prox. on the terms and conditions specified in our joint correspondence." One of these terms and conditions was that the defendants should allow to the plaintiffs the sum of £25 annually towards office expenses in Liverpool—a provision which presumably would only operate from the date on which the agency commenced. If no date had been named, I think there would have been a good contract, and the agency would have commenced at once, or at all events within a reasonable time. But, be that as it may, once a date was named by one of the parties, I cannot think that it was not open to the other party to say: "That date will not suit me, and I will not agree to it"; and if that be so, there could be no concluded agreement until the other party agreed to the date proposed, or secured agreement to a different date.

In my opinion it does not affect the question that the date proposed was apparently a reasonable one. If the date proposed had been the 1st of January, or some other date, defendants might have considered that that would not suit them, and consequently might have refused to agree to it; and if so, there would have been no concluded contract.

I do not think that this case is covered by the decision in *Clive* v. *Beaumont* (1). That was a suit for specific performance, and the question was whether there was a contract which could be enforced. The terms on which the defendants offered to purchase the remainder of the plaintiff's term in the lease of a house and part of his furniture were accepted, and at the end of the acceptance there was the statement: "We hope to give you possession by the half-quarter day." After this plaintiff's lease of the house was sent to the defendant, who in reply asked for the name of plaintiff's solicitor, and said he would forward him the draft assignment, and that he hoped to be able to take possession a day or two after

(1) 1 De G. & Sm. 397.

Christmas. Defendant afterwards sent the draft assignment, and wrote that he would be at the house and take possession on the following Monday. When he went on Monday he refused to give a cheque for the furniture unless deduction was made on account of repairs. After this the action for specific performance was commenced. The only question that the Court had to decide was whether there was a contract which could be enforced, and the learned Vice-Chancellor says: "I am of opinion that these words (the words as to possession) were not intended to operate, and did not operate, as a qualification of the contract or a qualification of the acceptance, but that if they had operated as a qualification of the contract or a qualification of the acceptance the circumstances which afterwards occurred were more than sufficient to do away with any possible effect that could be suggested to arise from it."

In the present case the parties were entering into a contract for a commercial agency by one of them for the other. I cannot think that the date on which that agency was to commence was immaterial, particularly as one of the parties was to be bound to make an annual payment in respect of office expenses in connexion with the agency. I do not think the case of *Simpson* v. *Hughes* (1) puts the matter further. I am therefore of opinion that the final act completing the contract was defendants' letter of 12th June, 1911, written and posted in Scotland, and that therefore the contract was entered into in Scotland, and the order for service out of the jurisdiction should be set aside with costs.

The Court being equally divided in opinion, Gordon J. withdrew his judgment, and thereupon an order was made refusing the defendants' motion with costs.

Dec. 10.

The defendants appealed (2).

E. S. Murphy K.C. and *Dockrell*, for the appellants:—

We submit that the letter of June 10th, mentioning the date on which the agency was to commence, introduced a new and

(1) 66 L. J. Ch. 634.

(2) In the Court of Appeal, before SIR JAMES CAMPBELL C., and RONAN and O'CONNOR L.JJ.

Appeal. 1920.

WHEELER v. JEFFREY.

material term, and that there was no completed contract until that term was accepted. The acceptance was the letter of June 12th written by the defendants in Scotland. The contract was therefore one made in Scotland and not in Ireland, and it did not come within Order 11, rule 1 (f). [Authorities cited: *Clive* v. *Beaumont* (1), *Simpson* v. *Hughes* (2), and Fry's Specific Performance, 5th ed., p. 144.

Serjeant Hanna and *Tobias*, for the respondents :—

The inclusion in the letter of June 10th of a notification of the date on which the work was to commence was not the introduction of a new term: *Harris' Case* (3). The conduct of the parties showed that the introduction of the date was not a material term.

SIR JAMES CAMPBELL C.:—

We are all of opinion that the judgment of Pim J. cannot be allowed to stand. The facts are not in dispute. They turn upon correspondence between Scotch brewers and a firm of mineral water manufacturers in Belfast, and the purport of that correspondence was to endeavour to arrive at terms under which the Belfast firm would act as agents for the sale of the brewers' beers in West Africa. The parties appear to have come to terms rather quickly, but ultimately, on June 10th, 1911, Wheeler & Co. wrote to Jeffrey & Co.: "Under the circumstances we think your attitude is a reasonable one, and we will agree to carry on your agency as from the 1st July next on the terms and conditions specified in our joint correspondence." If they had left out the words "as from the 1st July next," and had simply agreed to carry on the agency on the terms specified in the joint correspondence, the question then would have been what was a reasonable time in connexion with the starting of the agency; and if the parties did not agree upon that, it would have to be determined by the Court. In reply to Messrs. Wheeler's letter Messrs. Jeffrey & Co. wrote: "We are in receipt of your favour of 10th inst., and note with pleasure that you are agreeable to carry on

(1) De G. & Sm. 397. (2) 66 L. J. Ch. 334.

(3) 7 Ch. App. 587.

the agency for our Lager, Pilsener, and Munich beers for West Africa as from the 1st prox. on the terms and conditions stipulated in our joint correspondence."

It is said that that was not an acceptance of the offer that the agency was to start from July 1st; that it was merely a notification in reference to an already completed agreement. I think it is impossible to construe it in that way, because it is admitted that it would have been open to Messrs. Jeffrey to have said, "No, we cannot agree; the 1st July would not suit us." And if it was open to them to reject, was it not a new and material term of the contract? The acceptance of that new and material term was by letter written in Scotland; and in these circumstances the order of Powell J., giving liberty to the plaintiffs to issue a writ for service out of the jurisdiction, cannot be allowed to stand.

The two cases upon which Pim J. relied seem to me after examination to have no bearing upon the point involved in this case. The first case, *Clive* v. *Beaumont* (1), was decided on the point that no new term had been introduced; there was only the mere expression of a pious hope or desire that something should happen. The other case, *Simpson* v. *Hughes* (2), is even clearer, and is put upon the same ground. In *Harris' Case* (3), cited by Serjeant Hanna, the prospectus stated that interest at the rate of ten per cent. was to be paid by allottees in respect of balances on shares due after a certain date. In that case no new term was introduced into the contract.

Here a new and material term was certainly introduced, and that new and material term was not accepted until the letter, written by Messrs. Jeffrey on June 12th in Scotland, was posted.

RONAN L.J. and O'CONNOR L.J. concurred.

Solicitor for the appellants: *R. Norman Potterton.*
Solicitors for the respondents: *Wheeler & M'Cutcheon.*

C. L.

(1) 1 De G. & Sm. 397. (2) 66 L. J. Ch. 334.
(3) 7 Ch. App. 587.

K. B. Div.
1921.
April 12, 25.

DUN LAOGHAIRE URBAN DISTRICT COUNCIL *v.* MORAN.

Landlord and tenant—Ejectment—Increase of rent—"Rent lawfully due"—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 *Geo.* 5, *c.* 17).

In proceedings under the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 Geo. 5, c. 17), where a "question" arises between the landlord and tenant as to the amount of the rent lawfully due, an order for possession cannot be made pending the determination of the "question" in the manner prescribed by s. 2, sub-s. 6, of the Act: so *held* by Molony C.J. and Dodd J., Pim J. dissentiente.

Case Stated for the opinion of the Court at the instance of the defendant pursuant to the Summary Jurisdiction (Ireland) Act, 1857 (20 & 21 Vict. c. 43).

At a sitting of the Dublin Metropolitan Police Court holden in and for the said police district at Dun Laoghaire on the 27th day of January, 1921, the complainant sought by a certain summons that the defendant should show cause why he did neglect and refuse to quit and deliver up possession to the landlord or his agent of certain premises occupied by him (the said defendant), consisting of the house situated at 27 Desmond Avenue, Dun Laoghaire, otherwise Kingstown, within the said district, held by him for a term not exceeding one calendar month, at a rent not exceeding one pound sterling by the month, contrary to the statute in such case made and provided.

The said summons was heard before Mr. Lupton, the Divisional Magistrate, and adjourned by him to the Dublin Police Court (north side) on the 3rd day of February, 1921. Upon such adjourned hearing the magistrate made an order for possession of the premises, but suspended execution under sect. 5, sub-s. 2, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, on the conditions—1. That the tenant forthwith makes an application to the learned Recorder of Dublin under sect. 2, sub-s. 6, of said Act to determine any question arising; 2, that pending the hearing of such application the increased rent demanded by the notice

under sect. 3 of the said Act be paid by the tenant to the landlord; 3, that in default of payment of such increased rent for one week execution shall issue.

The case stated set out as follows:—

1. The complainants duly served, under sect. 3, sub-s. 2, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (1), a notice for an increase of rent within the limits and in respect of the items authorized by sect. 2, sub-s. 1, of the said Act, and the defendant has not paid the rent so demanded or any part of it. 2. That the said notice duly expired. 3. That thereupon a valid notice-to-quit was duly served upon the defendant and expired, and that possession of the premises was duly demanded by the complainants and refused by the tenant.

My findings in law are embodied in the following summary of my decision. The following sections of the Increase of Rent, &c., Act apply to these cases:—Sect. 2, sub-s. 1, prescribes the increases that may be made; sub-s. 6, that any question arising under sub-sects. 1, 2, or 3 of the section shall be determined by the County Court; sect. 3, sub-s. 2, that the "increase shall be due" immediately on the expiration of one clear week after service of the notice in the case of rates, and at the end of four clear weeks in the case of all other increases; sect. 5, sub-s. 1 (*a*), provides that an order for recovery of possession may be made when "any rent lawfully due from the tenant has not been paid"; sub-s. 2 provides that at the time of making such order "the Court may . . . stay or suspend execution, or postpone the date of possession for such period or periods as it thinks fit, and subject to such conditions in regard to payment by tenant of arrears of rent and otherwise as the Court thinks fit."

I have no power whatever to increase or reduce rent, but when the prescribed notice has been served for an increase within the limits permitted under sect. 2, and the time has expired, the effect of sect. 3, sub-s. 2, is that the increase is "due" by statute in my opinion. The word used in the last-mentioned section is "due," and the word used in sect. 2, sub-s. 2, with regard to the increases is "suspend," which implies something already in existence which may "cease from operation."

(1) 10 & 11 Geo. 5, c. 17.

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The contention for the tenant is that, although sect. 2 has been fully complied with by the landlord, the tenant can bar proceedings for the recovery of the increase, or for possession of the premises based on it, by merely asserting in Court that a "question" has arisen which it is proposed to have determined by an application to the learned Recorder under sect. 2, sub-s. 6. I do not think this is the meaning or intention of the Act. To interpret it so might mean that a tenant would never make such an application, and the landlord could not recover the increased rent until he himself applied. This would be unfair to the landlord. On the other hand, it would be unfair to the tenant to make an absolute order for ejectment without giving him an opportunity for recourse to the learned Recorder.

I think that, on proof of service of the notice under sect. 3 and its expiration and non-payment of the increased rent, the proper course is to make an order for possession, but to suspend execution under sect. 5, sub-s. 2, on the conditions—1, that the tenant forthwith makes an application to the learned Recorder under sect. 2, sub-s. 6, to determine any question arising; 2, that pending the hearing of such application the increased rent demanded by the notice under sect. 2 be paid by the tenant to the landlord; and 3, that in default of payment of such increased rent for one week execution shall issue.

This order will be fair to landlord and tenant; the landlord will get the increased rent pending the application, whilst the tenant, after the determination of the question, can take credit in future payments of rent for, or have refunded to him in cash, that part of the increased rent to which he is entitled under the order of suspension, if any.

The questions for the opinion of the Court are:—

Was I correct in point of law in holding—

1. That when the prescribed notice has been served for an increase within the limits permitted under sect. 2, and the time has expired, the effect of sect. 3, sub-s. 2, is that the increase is "due" by statute?

2. That the tenant cannot, when sect. 2 has been fully complied with, bar proceedings in a Police Court for recovery of possession

of premises, based on the refusal to pay the increased rent, within the limits and in respect of the items authorized by the section, by an assertion at the hearing that a "question" within the meaning of sub-s. 6 has arisen?

3. If question 2 be answered in the affirmative, are the conditions, or any of them, imposed by my order authorized by law?

Wm. J. Gleeson, for the appellant:—

The notice to be served under the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, sect. 3, sub-s. 2, must be valid in substance and in form. The notice served was invalid as to rates. When any question arises under sect. 2 of the Act, the increase becomes "rent lawfully due" only when a decision of the County Court has finally determined the dispute in the manner prescribed by the Act and the rules thereunder: sect. 2, sub-s. 6. Sect. 3, sub-s. 2, fixes no time when the increase "shall be due." The time is fixed by the operation of sect. 2.

Sect. 2 has not been "fully complied with" in the absence of proof in the ejectment proceedings that the increased rent was "lawfully due" under the Act. The magistrate is restrained by sect. 5, sub-s. 1 (*a*), from making the order. He had no jurisdiction to do so. No rent apart from the increase was due.

As the magistrate had no jurisdiction to make the order, he had no jurisdiction to order payment of the increase or to direct the issue of the decree.

Lardner, for the respondent:—

If the argument on behalf of the tenant is correct, no decree in ejectment can be made until the amount due is ascertained in form and substance. Either the landlord or tenant can apply to the County Court for the determination of any question in respect of increases claimed. If the tenant applies, he prevents the landlord from bringing proceedings against him for non-payment of rent, and the landlord's rights may be postponed indefinitely. The Act provides that the rent is not to become due until certain periods expire, but on the expiry of these periods of time the increase becomes due by virtue of the statute.

Cur. adv. vult.

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PIM J.:—

The only point we have to consider in this case is whether, in law, the magistrate had power to make the order which he made.

By the 2nd section of the Increase of Rent and Mortgage Interest Act, 1920, it is enacted that "the amount by which the increased rent of a dwellinghouse may exceed the standard rent shall be as therein stated." These words presuppose that the increased rent shall be the rent. By sect. 3, sub-s. 2, of the same Act it is enacted that, "notwithstanding any agreement to the contrary, where the rent of any dwellinghouse to which this Act applies is increased, no such increase shall be due or recoverable until or in respect of any period prior to the expiry of four clear weeks, or, where such increase is on account of an increase in rates, one clear week after the landlord has served on the tenant a valid notice in writing of his intention to increase the rent, which notice shall be in the form contained in the First Schedule to the Act, or in a form substantially to the same effect."

Now, it is true that this sub-section does not positively state that the increases shall be due and recoverable, but it says that they shall not be due and recoverable until certain things have happened, namely, the expiry of particular periods of time. The legal inference is clear that, on the expiry of the respective periods of time mentioned, the increases become due and recoverable, for a statement that something is not to be until the happening of a certain event means that it is to be on such event happening, and therefore may be acted on. This is borne out by the statutory notice contained in the Schedule to the Act, a copy of which was served on the tenant. The notice contains the following statement:—"The increase under head (*b*) will date from , being one clear week from the date of this notice, and the remaining increases from , being four clear weeks from the date of this notice." This is a direct indication that after the periods of time mentioned the increases would form a part of the rent, and therefore recoverable as the rent is recoverable.

It is true that questions may arise in respect to the increases claimed, and sub-s. 6 of sect. 2 provides that either the landlord or the tenant may apply to the County Court for the determination of any such questions. If the tenant applies, he thereby prevents the landlord from bringing proceedings against him for non-payment of the increased rent until the decision is had. If he does not apply, he takes the risk. It is his own fault if anything untoward happens.

The periods of time given by sub-s. 2 of sect. 3 before the increases of rent become due and recoverable are evidently given for the purpose of allowing the landlord or the tenant to apply to the County Court to have any question that may have arisen in respect of the increases decided. Where it is the tenant who questions the increase, surely it is his duty to go to the County Court at once.

If the learned magistrate is held to be wrong in the decision he has come to, the effect will be that the tenant, by refusing to pay, and refusing to apply to the Recorder, can indefinitely bar all proceedings for the recovery of the increases, or for possession of the premises, or, at all events, can bar them until the landlord appeals to the County Court.

I think it might have been wiser for the magistrate to have adjourned this case, fixing a time within which the tenant should apply to the Recorder; but the contention that no order for possession can be made so long as the tenant chooses to assert that the increases are not legal would apply to that order in the same way as it applies to the one now challenged, and a simple order of adjournment until the tenant applied to the Recorder would partake of the nature of farce.

I am of opinion that the learned magistrate had power to make the order he has made, and that the three questions put by him should be answered in the affirmative.

DODD J.:—

I have had the advantage of reading the judgment of the Lord Chief Justice, and I agree with it. Even if I concurred with my brother Pim's construction of the words "due and

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recoverable," I think that a Judge should hold that the tenant's refusal, in the circumstances, to pay the increased rent was not enough to warrant him in forfeiting the tenant's interest in the premises.

MOLONY C.J.:—

Prior to the 3rd August, 1914, Michael Moran became tenant of the Kingstown Urban District Council (now known as the Dun Laoghaire Urban District Council) of the house known as No. 27 Desmond Avenue, under a weekly tenancy, at the rent of 3*s.* 6*d.* per week. On the 27th November, 1920, the Council served on the said Michael Moran a notice in pursuance of the provisions of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, increasing the rent to 4*s.* 6*d.* weekly, made up of three sums, namely, 7*d.* per week under sect. 2, sub-s. 1 (*b*), of the Act; one and three-fifths of a penny under par. (*c*) of the same sub-section; and three and two-fifths of a penny under par. (*d*) of the same sub-section, making in all the increase of one shilling.

The tenant refused to pay the increase, and the Council thereupon issued a summons to recover possession of the premises, which summons was heard before Mr. Lupton, one of the Divisional Magistrates of the Dublin Metropolitan Police Court, on the 27th of January last. The magistrate found that the notice under the Act of 1920 had been duly served, and that the time prescribed by sect. 3, sub-s. 2, had duly expired; and the magistrate also found that a notice-to-quit which had been served on the tenant had expired, and that possession of the premises had been duly demanded and refused.

In this state of facts the Council contended that they were entitled to recover possession notwithstanding the provisions of the Act of 1920, because under sect. 5, sub-s. 1 (*a*), "rent lawfully due from the tenant has not been paid." The tenant, on the other hand, denied the accuracy and legality of the proposed increase, and contended that this raised a question which, under the provisions of sect. 2, sub-s. 6, could only be determined on the application either of the landlord or the tenant to the County Court. It was stated in the argument, though it does not appear in the case, that the reason for questioning the validity of the increase was that the Council proceeded on the basis that the tenant was not to pay any of the rates, and took no notice of the

decision of the House of Lords in the case of *Bradshaw* v. *M'Mullan* (1).

Mr. Lupton did not consider it right to make an order adjourning the case until an application to the Recorder could be made, but granted a decree for possession, suspending its execution under the provisions of sect. 5, sub-s. 2, of the Act on the conditions—1, that the tenant forthwith make an application to the Recorder under sect. 2, sub-s. 6, to determine any question arising; 2, that pending the hearing of such application the increased rent demanded by the notice under sect. 2 be paid by the tenant to the landlord; 3, that in default of payment of such increased rent for one week execution to issue. Mr. Lupton's decision is attended with a certain amount of convenience, but I have come to the conclusion that it cannot be sustained in law. Before he gave a decree under sect. 5 at all he was bound to determine affirmatively that rent lawfully due from the tenant had not been paid, and he could not, in my opinion, so find when a question was raised as to the validity of the notice, and that question had not been decided by the Recorder in the manner pointed out by the Act.

Sect. 3, sub-s. 2, relied upon by Mr. Lupton, does not amount to an affirmative declaration that the rent becomes due and recoverable at the expiry of the periods therein mentioned, but is simply a provision that the rent shall not be due and recoverable in any event before that period, and is quite consistent with the fact that it may not even then be lawfully due if a question has arisen in reference to the amount which has not yet been determined in the manner provided by the Act. Once a question has arisen either party may apply to the County Court; and the suspension of the right to recovery of the rent until the amount of the rent had been determined seems to be contemplated by the Act.

I am consequently of opinion that questions 1 and 2, put by Mr. Lupton, should be answered in the negative, and that question 3 consequently does not arise. The case must therefore be remitted to him to proceed as to justice shall appertain, and he will have jurisdiction either to refuse the application or to adjourn it until after the question of the amount of the rent has been determined by the Recorder.

Solicitor for the appellant: *James Brady.*
Solicitor for the respondent: *E. J. Kenny.*

H. J. M'C.

(1) [1920] 2 I. R. 412-490.

K. B. Div.
1921.
May 31.
June 2, 14.

MULLAN AND OTHERS *v.* FORRESTER (1).

Nuisance—Negligence—Highway—Unnecessary to prove defendant's knowledge of nuisance—Fall of wall on persons lawfully using highway.

A wall on the land of the defendant abutting on a public highway was blown down during a severe storm, and killed three persons. The plaintiffs claimed damages under the Fatal Accidents Act (9 & 10 Vict. c. 93), and the jury negatived negligence on the part of the defendant.

The Judge at the trial declined to direct the jury on the question of nuisance.

Held, per Pim and Gordon JJ., that the wall being a nuisance it was unnecessary for the plaintiff to prove that the defendant knew, or ought reasonably to have known, of its defective condition; and accordingly that a new trial should be ordered.

Per Moore J., dissentiente, following the judgment of Blackburn J. in *Tarry* v. *Ashton* (1 Q. B. D. 314), and the judgment of the Court in *Palmer* v. *Bateman* ([1908] 2 I. R. 393), that where the occupier of premises is sued in nuisance, and where (*a*) he is not the original creator or introducer of the nuisance, (*b*) where the matter or thing was not at the time of its creation or introduction dangerous per se, (*c*) where the matter or thing subsequently becomes dangerous through defects not reasonably to be discovered, the plaintiff to succeed must establish actual or imputed knowledge in the occupier of the existence of the nuisance.

MOTION to set aside a verdict and judgment for the defendant, Alexander Forrester, or in the alternative for a new trial.

These actions were brought under Lord Campbell's Act by the dependants of three persons killed by the fall of a wall which abutted on the highway on the land of the defendant.

The father of the present defendant was the owner of a dyeworks on the Shankhill Road, Belfast, called the Glenwood Dyeworks. They passed to the present defendant on his father's death.

In the year 1897, the Corporation of Belfast widened the Shankhill Road, and in the course of such widening the street wall of the dyeworks was pushed back some 10 feet or so. The new wall was built by the Corporation, and was bonded into the side walls of the building and roofed by the defendant. There

(1) Before PIM, MOORE, and GORDON JJ.

was a basement under the building, and the height of the wall between the foundation and the level of the footpath was 6 feet 6 inches, and from the level of the footpath to the top of the wall, 15 feet 6 inches. The wall was 14 inches in thickness and over 70 feet in length. In the year 1910 the works were closed down, and, practically speaking, nothing in the way of repairs was done to them from that time down to the present.

In the month of May, 1920, notice was served on the defendant by the Corporation of Belfast to take down such portions of the building as were dangerous, and a second notice to the same effect was served on him on the 24th September, 1920. Neither notice specifically mentioned what particular portion of the building was dangerous.

In consequence of these notices, at the end of September or the beginning of October, 1920, the defendant took down the roof of the building and the walls, other than the street wall. This action of his left the street wall exposed from both sides; the support it got from the bonding into the side walls was gone, the roof was gone, and the protection afforded by the parallel wall on the opposite side of the building was gone.

On the 3rd December, 1920, during the course of a tolerably heavy storm, the whole wall was blown down into the street, and three men were killed. Three actions have been brought against the defendant under Lord Campbell's Act, and in the particular case with which we have to deal, an action was brought by the widow of William Mullan, one of the men killed by the wall, suing on behalf of herself and her five children.

The actions were tried before the Rt. Hon. Mr. Justice Dodd and a special jury of the County of the City of Belfast, on March 31st and April 1st, 1921, as one action pursuant to an order of the King's Bench Division, dated the 8th day of April, 1921.

It was not disputed that the wall was on the land of the defendant, nor was it disputed that it fell. It fell during a severe storm, being unable to resist the force of the gale; but counsel for the plaintiff contended that there was an absolute duty on the defendant, and that liability did not depend upon the degree of care necessary in the circumstances.

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The questions submitted to the jury and their findings were as follows:—

1. Did the defendant know that the wall was dangerous? No.

2. Ought he to have known that the wall was dangerous? No.

3. Was the defendant negligent (*a*) in not taking due care to see that the premises were safe? No. (*b*) In not having the premises inspected from time to time with a view to the safety of the public? No. (*c*) In not reasonably anticipating that the wall might be thrown down by the wind? No.

4. What sum do you award in respect of the death of William John Bell to Samuel Bell (father), £55; Hugh Bell (brother), £5; Henrietta Bell (sister), £5; Margaret Bell (sister), £5; Lily Bell (sister), £5? Total, £75.

5. What sum do you award in respect of the death of William Mullan to Margaret Mullan (widow), £150; Robert Mullan (son), £5; George Mullan (son), £5; Mary Mullan (daughter), £50; Margaret Mullan (daughter), £35; Richard Mullan (son), £5? Total, £250.

6. What sum do you award in respect of the death of Elizabeth Taylor .to John Taylor (father), £25; Elizabeth Taylor (mother), £25? Total, £50.

These sums were found by the jury provisionally to avoid further trial.

The Judge gave judgment for the defendant with costs.

The learned Judge in the course of his report said:—

At the close of the plaintiffs' case defendant's counsel asked for a direction on the ground that there was no evidence of negligence, or that the defendant knew or ought to have known that the premises were dangerous. I pointed out that there was a count for nuisance. It seemed to be a case of new law . . . I referred to *Tarry* v. *Ashton* (1) and *Palmer* v. *Bateman* (2), and said that both these cases left me in doubt as to the law. No other authority was cited. Counsel for the defendant relied strongly on the judgment of the Lord Chief Justice in *Palmer* v.

(1) 1 Q. B. D. 314. (2) [1908] 2 I. R. 393.

Bateman (1), and his reading of Mr. Justice Blackburn's judgment in *Tarry* v. *Ashton* (2). I declined to direct . . . I thought *Tarry* v. *Ashton* (2) . . . was based to some extent on the principle that the defendant was a trespasser, and if he erected a projecting structure over the highway that he did it at his own risk. On the other hand, I thought Lord O'Brien's judgment might be pressed too far. A slate blown off a house in a storm would be different from a wall incapable of standing a severe storm. A man must contemplate severe storms.

Serjeant Hanna's requisition was as follows:—

"I ask your Lordship to direct the jury that in the case of a nuisance the duty of the landowner is an absolute one, and that the liability therefor does not depend upon the degree of care necessary to be used under the circumstances. I also ask your Lordship to direct the jury that the wall in this case was a nuisance, if they are of opinion that it was a danger to passers-by on the footpath. I also ask your Lordship to direct the jury that the occupier of property cannot get rid of his liability by employing a contractor."

The difficulty I had as to these requisitions was that they did not raise a distinct issue for the Judge. I was with the first requisition, but it was conditioned by the words "in the case of a nuisance." The question at issue was: "Is this a nuisance?"

The difficulty as to the second was caused by the words "if they are of opinion that the wall was a danger to passers-by on the street." There was no controversy; it was not dangerous to passers-by on the street except in the case of a high wind. It was dangerous to passers-by in a high wind, or rather in a wind of the velocity of the wind on the day of the occurrence. I was quite in accordance with the third, that the occupier of property cannot get rid of his liability by employing a contractor. But that again was possibly subject to the qualification "with knowledge of the defect." It might be evidence of negligence. I said all I could do was to get every controverted issue of fact determined by the jury.

(1) [1908] 2 I. R. 393.

(2) 1 Q. B. D. 314.

K. B. Div. 1921.

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Serjeant Hanna then asked me to leave the following questions:—

1. Was the wall after the removal of the roof in June, 1920, and having regard to its construction and situation, in a dangerous and unsafe condition so as to become a nuisance to ordinary passers-by?

2. Was it in that sense a nuisance on 3rd December, 1920?

3. Was it by reason of its dangerous and unsafe condition that it fell?

4. If the wall was in a dangerous condition on 3rd December, 1920, could the defendant by the exercise of reasonable care have ascertained the condition of the wall between June and December?

5. Could the Corporation official have discovered its unsafe condition by a reasonably efficient examination?

These questions did not remove my difficulty. In form the first question was objectionable in the "having regard," a form objected to successfully in former cases. But in form also it amounted to the general issue. I should have to frame questions from which the inference would necessarily follow. If I had left a question, "Was it a nuisance?" I should have been obliged in point of law to direct what would in law amount to a nuisance. And I would have met with the same difficulty. Was knowledge of the defect a necessary factor in a nuisance?

In the end I said I would not leave any questions on two matters, each of which was conceded, or on which, if I put them to the jury, I should direct:—

1. Was the wall dangerous to passers-by, in an ordinary state of the wind?—to which the answer would be "No."

2. Was the wall dangerous to passers-by in a wind of the velocity it was on the day in question?—to which the answer would be "Yes."

If the Serjeant was right in his application for a direction that it was ipso facto a nuisance, he would carry his case in the Court above. But if the defendant was not an insurer or limited assurer of the safety of the wall, the questions I proposed would, I thought, cover all questions of fact that the Court might need to determine the law. I accordingly framed them as they appear (supra).

The plaintiffs based their application for a new trial on the following grounds:—1, that the learned Judge declined to comply with the requisitions of counsel for the plaintiff handed in at the trial; and, 2, declined to put any question based on the wall being a nuisance; and, 3, misdirected the jury in reference to the liability of the defendant in respect of the wall in question in the case in saying that there was no liability unless the defendant knew then, or could reasonably have known, of its condition on the ground that the damages are inadequate; and, 4, that the whole trial was unsatisfactory.

The further facts and counsels' arguments appear sufficiently from the judgments.

Serjeant Hanna K.C., *Andrews K.C.*, and *Warnock*, for the plaintiffs.

M'Gonigal K.C., *H. M. Thompson K.C.*, and *Beattie*, for the defendant.

[Authorities cited and discussed:—*Tarry* v. *Ashton* (1); *Palmer* v. *Bateman* (2); *R.* v. *Watson* (3); Garrett on Nuisances (ed. 1908), pp. 40, 76, 77; Pollock on Torts (ed. 1916), pp. 539–542; *Quarman* v. *Burnett* (4); *Todd* v. *Flight* (5); *Barnes* v. *Ward* (6); *Silverton* v. *Marriott* (7); *Fisher* v. *Prowse* (8); *Hadley* v. *Taylor* (9); *Fenna* v. *Clare & Co.* (10); *Wheeler* v. *Commissioners of Public Works* (11); *Harrold and Another* v. *Watney* (12); *Stewart* v. *Wright* (13); *Sandford* v. *Clarke* (14); *Bowen* v. *Anderson* (15); *Brown* v. *Eastern and Midland Railways Co.* (16); *Crane* v. *South Suburban Gas Co.* (17); Pratt and Mackenzie's Law of Highways, 16th ed., p. 116; Halsbury's Laws of England, vol. xxi, at pp. 399, 506–7, 515, 525, 526, 530, 535; *Kearney* v. *London and Brighton Railway Co.* (18); Russell on Crimes, vol. ii, p. 1838; Saunders on Indictments, p. 201 et seq.; *R.* v. *Moore* (19); *Greenock Corporation* v. *Caledonian Railway* (20).]

Cur. adv. vult.

(1) 1 Q. B. D. 314.
(2) [1908] 2 I. R. 393.
(3) 2 Raymond's Reports, 856.
(4) 6 M. & W., at p. 510.
(5) 9 C. B. N. S. 377.
(6) 9 C. B. 393.
(7) 59 L. T. N. S. 61.
(8) 2 B. & S., at p. 779.
(9) L. R. 1 C. P. 53, at p. 55.
(10) [1895] 1 Q. B. D. 199.
(11) [1903] 2 I. R. 202.
(12) [1898] 2 Q. B. 320.
(13) 9 T. L. R. 480.
(14) 21 Q. B. D. 398.
(15) [1894] 1 Q. B. 164.
(16) 22 Q. B. D. 391.
(17) [1916] 1 K. B. 33.
(18) L. R. 6 Q. B. 759.
(19) 3 B. & Ad. 184.
(20) [1917] A. C. 556.

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PIM J., having stated the facts as above set out, proceeded :—

The statement of claim prays for damages against the defendant, first, for the defendant's negligence in keeping and maintaining the wall; and, secondly, "for that the defendant, being possessed of a wall adjoining a public highway known as Shankhill Road, suffered the said wall to be in a defective and dangerous condition, and so as to be dangerous to persons lawfully passing along the said highway, in consequence of which the said wall fell upon the said William Mullan while he was lawfully passing along the said highway, and killed him."

This second count is a count in nuisance. The case was tried before Mr. Justice Dodd and a special jury of the City of Belfast on the 31st March and 1st April of this present year. The learned Judge left to the jury a number of questions, all sounding in negligence. He was asked by Mr. Serjeant Hanna, who appeared for the plaintiff, to leave questions to the jury couched in nuisance, and the learned Serjeant submitted five questions for the consideration of the Judge. The questions seem to me to have been somewhat unhappy in their wording, and may have puzzled Mr. Justice Dodd; but, in the result, the Judge refused to put any questions in nuisance to the jury. We are now asked to say that in refusing to put these questions the learned Judge was wrong, and that the case was never properly tried.

On the questions put by the learned Judge, the jury found for the defendant, but the Judge, evidently having some doubt as to whether he was right in not putting questions in nuisance, got the jury to assess damages in case it should turn out that he was wrong in what he had done.

So far as the Judge's notes are concerned, it would appear to me that the great mass of evidence offered went to the question, not of negligence, but of nuisance. I cannot myself find any fault with the findings of the jury in respect of the question of negligence left to them. There was really no evidence that the defendant had been guilty of any negligence. The wall was an old one, but there is no suggestion from the beginning to the end of the case that, qua the particular kind of wall, it was in a defective or improper condition. The allegations made throughout

by the various witnesses were, not that the wall was out of repair or defective in any way, but that a wall of its length, height, and thickness, when left standing alone and without the protection afforded by the other walls and by the roof, was dangerous in itself, that every storm would tend to render it more insecure, and that in the end it must come down.

Mr. W. J. Gilliland, architect, who made the plans and sketches that were put in, said as follows (I quote from the learned Judge's note) :—"The wall was unprotected and unsupported from winds at the back. The point of greatest tension is where the wall reaches the footway. The two factors are the weight of the wall and the adhesion of the mortar. A wind velocity of 39½ miles. At 41½ miles a fracture begins at the point of tension and destroys the mortar. This factor weakened. There was a wind of 54 miles' velocity a short time before this. This loosened the mortar. The wall had then no support but its own weight. The wall was then unsafe. A man of any ordinary intelligence would have seen that the wall was dangerous."

Mr. Frank Hummel, Professor of Engineering in the Queen's University, Belfast, gave evidence as follows (I still quote from the note):—"The thickness of the wall was 14 inches from front to rear scientific. Data wall, 14 inches thick, 15 feet 6 inches high, with no interim support in the way of buttresses. I calculated the wind pressure and wind velocity: 55½ miles' velocity, 9·8 lbs. per square foot; 41½ miles would start the bricks from mortar at point of tension. A wall should be only 5 feet high if it is to be kept the length of 79 feet." To me: "If the roof, though bad, and the back wall had remained, they would have broken the force of the wind. There was not as matters stood anything to prevent the full force of the wind striking the front of the wall." I said, "You suggested that the two weak parts of the building supported each other like two drunken men—when one went the other fell?" Witness: "Yes, something like that."

Mr. Shaw, a building inspector, was examined on behalf of the defendant (I again quote the note):—"The wall seemed to be a sound strong wall. Nobody could have thought it would fall." Mr. Pinkerton, the Assistant City Surveyor, said in cross-examination: "It would be impossible to say if, the removal of the roof

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would render the wall less capable of resisting the wind. I have not the necessary data. As the wall was originally constructed it was perfectly safe." Mr. Chamberlain, Chief Assistant Engineer of the Belfast Harbour Commissioners, gave evidence of the force of the wind on the day. He said that it varied from about 30 miles an hour to at one moment 71 miles an hour. The average would have been from 50 to 52 miles an hour. He further said that he thought the force of the wind in or about the time the wall fell would have been about 61 miles an hour.

No evidence of any kind was given to prove that the storm was an exceptional one, or one that does not occur every year in the latitude in which we live, and which must from time to time be expected.

The case was argued by Mr. M'Gonigal, on behalf of the defendant, on the basis that the wall was dangerous as it stood; but he contended that the defendant was quite unaware that there was anything unsafe in the condition of the wall, and that it was necessary, before he could be found guilty of nuisance, that he should have the knowledge that it was dangerous. He contended that, inasmuch as the jury had, in reply to the questions 1 and 2 left to them by the Judge, found that the defendant did not know that the wall was dangerous, and ought not to have known that the wall was dangerous, there would be no use now in ordering a new trial, because the jury had already found that the defendant was ignorant, and therefore, according to Mr. M'Gonigal, innocent in the matter. This raises a very nice point, with which I shall have to deal, but, first of all, I desire to say a few words on the question of nuisance.

It is by no means clear in law how far a person having property beside a highway is liable for injury that may occur by reason of the fall of anything off his property which causes injury to a person passing on the highway. We were referred to an American case in the State of New York, according to which the law in America seems almost to go the length of holding that an owner of property beside the highway was an insurer of the life and limb of those who were lawfully walking on the highway. In the last edition of Clarke and Lindsell on Torts, which only appeared at the beginning of the present year, it is suggested

that the case of *Tarry* v. *Ashton* (1) and *Firth* v. *The Bowling Iron Co.* (2) go that far. The learned author says, summing up the effect of these cases as he understood them: "If a brick or a stone falls out of the wall of a building, or a tile or chimney-pot from the roof, the owner of the premises will probably be responsible for any damage that may be caused thereby, irrespective of any question of negligence . . . . , the reason being that he who maintains bricks, tiles, or other bodies in a position from which they may fall of their own weight maintains them at his peril." This statement of the law has never yet been enunciated by the Courts, but it seems to me implicit in certain of the decisions in the older cases.

In *Lambert* v. *Bessey* (3) it is laid down "if a man doeth a lawful act, yet if injury to another arises from it, the man who does the act shall be answerable"; and in *Rylands* v. *Fletcher* (4) Lord Cranworth used the following language:—"In considering whether a defendant is liable to a plaintiff for damage which the plaintiff may have sustained, the question in general is, not whether the defendant has acted with due care and caution, but whether his acts have occasioned the damage. This is all well explained in the old case of *Lambert* v. *Bessey* (3), reported by Sir Thomas Raymond, and the doctrine is founded on good sense, for when one person in managing his own affairs causes, however innocently, damage to another, it is obviously only just that he should be the party to suffer. He is bound sic uti suo ut non laedet alienum. This is the principle of law applicable to cases like the present; and I do not discover in the authorities which were cited anything conflicting with it."

It would seem, therefore, from these cases that it could be contended, with possible success, that, even were the wall not a nuisance in the legal sense of the word, the defendant would be liable at Common Law. We have not to decide that point, and therefore it is not necessary to go further into it.

Whether the wall in question did in fact constitute a Common Law nuisance or not is solely a matter for a jury, and although I think that the evidence given during the case, as reported by the

(1) 1 Q. B. D. 314.
(2) 3 C. P. D. 254.
(3) Sir T. Raymond's Repts. 421.
(4) L. R. 3 H. L. 330.

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learned Judge, is altogether in favour of the view that it became a nuisance from the time when the roof and the side and back walls were removed, still the parties are entitled, if they so desire, to have the decision of a jury on the matter; and without their consent I will not take upon myself to give any decision. I may add that I see no distinction in law between erecting a wall which is a nuisance and doing an act which causes the erected wall to become a nuisance.

But it is necessary to consider whether knowledge on the part of the defendant was essential to finding him guilty of nuisance. My brother Gordon, during the course of the case, referred to a statement in Russell on Crimes, which shows that in the opinion of the learned author of that book knowledge was not necessary.

The point came up in a very clear way before the Court of Queen's Bench in England in a criminal case of *The Queen* v. *Stephens* (1). The note of the case is very short, and puts the point succinctly. It is as follows: — "The owner of works carried on for his profit by his agents is liable to be indicted for a public nuisance caused by acts of his workmen in carrying on the works, although done by them without his knowledge, and contrary to his general orders."

In that case the defendant, Stephens, had been indicted for obstructing the navigation of a public river—the Tivy—by casting or throwing, or causing to be cast or thrown, slates, stones, and rubbish in and upon the bed and soil of the river, and thereby raising and producing great mounds projecting and extending along the stream and water-way of the river. The evidence was that the defendant was an old man, and did not know what his workmen were doing, and that he had given general directions against depositing the rubbish in the river in the way in which it was done. Mr. Justice Blackburn told the jury that the defendant would be liable for the acts of his workmen though done without the defendant's knowledge, and against his orders. Mellor J., in giving the judgment of the Court, said:—"It is quite true that this, in point of form, is a proceeding of a criminal nature, but in substance I think it is in the nature

(1) L. R. 1 Q. B. 702.

of a civil proceeding, and I can see no reason why a different rule should prevail with regard to such an act as is charged in this indictment between proceedings which are civil and proceedings which are criminal. I think there may be nuisances of such a character that the rule I am applying here would not be applicable to them, but here it is perfectly clear that the only reason for proceeding criminally is that the nuisance, instead of being merely a nuisance affecting an individual, or one or two individuals, affects the public at large, and a private individual, without receiving some special injury, could not have maintained an action. Then, if the contention of those who say the direction is wrong is to prevail, the public would have great difficulty in getting redress. The object of this indictment is to prevent the recurrence of the nuisance. The prosecutor cannot proceed by action, but must proceed by indictment, and if this were strictly a criminal proceeding, the prosecution would be met with the objection that there was no mens rea; that the indictment charged the defendant with a criminal offence when in reality there was no proof that the defendant knew of the act, or that he himself gave orders to his servants to do the particular acts he was charged with; still, at the same time, it is perfectly clear that the defendant finds the capital and carries on the business which causes the nuisance, and it is carried on for his benefit. . . . Under these circumstances, the defendant must necessarily give to his servants or agents all the authority that is incident to the carrying on of the business. It is not because he had at some time or other given directions that it should be carried on so as not to allow the refuse from the works to fall into the river, and desired his servants to provide some other place for depositing it, that when it has fallen into the river, and has become prejudicial to the public, he can say he is not liable on an indictment for nuisance caused by the acts of his servants. It appears to me that all that was necessary to prove is that the nuisance was caused in the carrying on of the works of the quarry. That being so, my brother Blackburn's direction to the jury was quite right." And again:—"Inasmuch as the object of the indictment is, not to punish the defendant, but really to prevent the nuisance from being continued, I think that the evidence which would

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support a civil action would be sufficient to support an indictment." This case shows perfectly clearly that in the opinion of a Court composed of Mr. Justice Mellor, Mr. Justice Shee, and Mr. Justice Blackburn, knowledge is not necessary in civil actions, and also in certain criminal actions, which the learned Judge held were in their nature civil proceedings.

This case was followed by a case of *Humphreys* v. *Cousins* (1). In that case the plaintiff and the defendant were, respectively, owners of adjoining houses. An old drain, which commenced on the defendant's premises, and thence passed under and received the drainage of several other houses, turned back under the defendant's house, and thence under the cellar of the plaintiff's house, and ultimately into a public sewer. The part of the return drain which passed through the defendant's premises being defective, the sewage escaped, and flowing into the plaintiff's cellar, did damage. The defendant was unaware of the existence of the return drain, and consequently of its want of repair. It was held that, notwithstanding his ignorance, the defendant was liable. "Moreover," said Mr. Justice Denman in the course of his judgment, "this right of every occupier of land is an incident of possession, and does not depend on the acts or omissions of other people. It is independent of what they may know or not know of the state of their own property, and independent of the care or want of care which they may take of it"; and later on, speaking of the duty of the defendant to guard his sewage from flowing into the lands of his neighbours, the learned Judge said:—"That duty, like his correlative right, is independent of negligence on the part of the defendant, and independent of his knowledge or ignorance of the existence of the drain."

It was suggested that a case of *Silverton* v. *Marriott* (2) points the other way. I think not. In that case the nuisance was not due to any act of the defendant. It was due solely to the act of third parties, who upset a wall belonging to him. This seems common-sense. The law, however, may be that, even in such a case, the defendant is liable to anyone injured by a nuisance created on property over which he had control; but until it is so held I see no reason to differ from the decision.

(1) L. R. 2 C. P. 239. (2) 59 L. T. 61.

The point still remains, was this wall a nuisance; that is, was it likely to fall if a heavy wind blew against it, and, therefore, was it a danger in itself? If it was, I again quote Mr. Justice Blackburn in *Rylands* v. *Fletcher* (1): "The owner must keep it at his peril; and if he does not do so, he is, prima facie, answerable for all the damage which is the natural consequence of its escape."

It may be argued that the principle of *Rylands* v. *Fletcher* (1) does not extend to the escape of solid bodies. That would seem to me to be wholly illogical in view of the decision in the case of *Rylands* v. *Fletcher* (1). The falling of a wall out of the property on which it is on to another property is certainly an escape of that wall. This point, which is the essential point in the case, was never tried, and I have no hesitation in saying that without it the case was not tried at all. I also am of opinion that the findings of the jury that the defendant did not know that the wall was dangerous, and ought not to have known that it was dangerous, do not try the case. I think, therefore, that unless the parties agree to our deciding the matter of nuisance, and allowing the damages to stand if we find against the defendant, we are coerced to send the case back to be tried by a jury in the City of Belfast, when the proper questions can be left for their decision.

The application must be granted with costs, the costs of the first trial to abide the result of the second trial.

GORDON J.:—

In so far as the plaintiffs' claims in these actions were based on negligence, the jury have found in favour of the defendant. In so far as it was based upon the wall which fell being a public nuisance, no question was put to the jury, though the learned Judge was requested by the plaintiffs' counsel to have such question or questions put. He did ask the jury whether the defendant knew, or ought to have known, that the wall was dangerous, and the jury answered both these questions in the negative; and so

(1) L. R. 3 H. L. 330.

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far as I can see, the learned Judge was of opinion that this was, on the facts of this case, a sufficient answer to any claim based upon public nuisance. No specific question was put as to whether the defendant, by having a proper examination of the wall made, could have ascertained that it was dangerous. The jury did find that he was not negligent in not having the premises inspected from time to time with a view to the safety of the public, or in not reasonably anticipating that the wall might be thrown down by the wind.

Now, a nuisance is something different from, and not to be confounded with, either trespass or negligence, though the wrong is in some respects analagous to trespass, and the two may coincide. If a person erects alongside a public highway upon his own land some structure, or makes some excavation which, as erected or made, is dangerous to persons lawfully using the highway, that is a public nuisance; and if any person lawfully using the highway is injured thereby, he has his cause of action. But I have not found or been referred to any cases of that kind in which any question as to whether defendant knew, or ought to have known, of the dangerous nature or condition of the structure erected, or excavation made by him, has been submitted to a jury or relied on as a defence to an action.

In *Harold* v. *Watney* (1), where a child was injured by the defendant's fence, abutting on the highway, falling on it, the child having stood wholly or partly on it, and the jury having found that the fence was very defective, no question as to defendant's knowledge of the condition of the fence was put to the jury. The Court of Appeal held that the defective fence being a nuisance, and the cause of the injuries to the plaintiff, the defendant was liable. Even in criminal cases on indictment for a public nuisance, in Russell on Crimes, p. 1838, it is stated that as a general rule the grievance lies in the inconvenience in fact caused, and not in the intent or knowledge of the person responsible: see *R.* v. *Moore* (2) and *R.* v. *Carlisle* (3). Of course, if the fact of the structure having become a nuisance was due to the act of some third party, or to the happening of something

(1) [1898] 2 Q. B. 320. (2) 3 B. & Ad. 184.

(3) 6 C. & P. 636.

which no one could be expected to foresee, knowledge or the absence of knowledge would, I think, be material in either a civil or criminal proceeding.

There are many cases founded on negligence where what the defendant knew or ought to have known is an important factor. Things done to a public highway, which would otherwise constitute a public nuisance, are often authorized by statute, as, for instance, gas and water companies laying pipes and mains in the highway, railway companies carrying bridges under or over public highways, or in some cases laying their rails on public highways at level crossings. By reason of the statutory powers given, these are not public nuisances, but those who exercise these powers must do so strictly in accordance with their statutory powers, and they must take due care that the works they have so constructed are kept in proper order and repair; and injury caused to persons lawfully using the highway by their failure to do so renders them liable to an action for negligence, as in *Oliver* v. *North-Eastern Railway Co.* (1), and other cases. A house properly erected alongside a highway is not a public nuisance, nor are the ordinary appurtenances attached to such house. But if the owner or occupier allows the house to become so dilapidated and ruinous as to be a danger to the public, it becomes a nuisance, and the question of what the owner or occupier (as the case may be) knew or ought to have known as to its condition then becomes important, as it has only become a nuisance by reason of his neglect to keep it in repair.

Two of the cases which have been so much discussed during the argument, in my opinion, throw a good deal of light on this question. In *Tarry* v. *Ashton* (2) a lamp which was affixed to a house and was projecting over the highway fell on the plaintiff and injured her, and a jury awarded damages, and judgment was entered for her. The lamp fell because it was out of repair. The claim was based on negligence, and also on the ground that the lamp was dangerous to the plaintiff lawfully using the highway. The jury found that there was no negligence on the part of the defendant personally, but that there was negligence on the part of a man he employed to repair the lamp, and that it was out of repair, but

(1) 9 Q. B. D. 409. (2) 1 Q. B. D. 314.

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not to the knowledge of the defendant. On a motion to set this verdict aside, Blackburn J. said: "It appears that the defendant came into occupation of a house with a lamp projecting from it over the public thoroughfare, which would do no harm so long as it was in good repair, but would become dangerous if allowed to get out of repair. It is, therefore, not a nuisance of itself, but if the defendant knowingly maintained it in a dangerous state, he would then become liable for a nuisance." He then goes on to say that the defendant was aware that the lamp was getting out of repair. It was his duty to make it reasonably safe; the contractor he employed failed to do so, and the defendant was liable for the consequences.

Now, this decision is based upon the fact, or the fact assumed by the learned Judge, that the lamp as originally erected was not a nuisance, but that the defendant was liable for the neglect of his duty to keep it in proper repair. But it leaves untouched the question of what would have been the defendant's liability if he had himself erected the lamp, and left it when erected in such an insecure condition that a week or a month afterwards, owing to that insecurity, it was blown down by an ordinary gale of wind or even by a severe storm, and injured a person lawfully passing along the highway. In the same way, in *Palmer* v. *Buteman* (1) the eave-gutter which fell was held not to be a nuisance when erected, and the question was, was its fall due to the defendant's negligence in not keeping it in proper repair? If the facts in the present case were the same, or the same in substance as in these cases, the defendant, on the findings of the jury as to negligence, would be entitled to retain the verdict and judgment entered for him. But what are the facts in this case? The wall which fell and killed these people who were lawfully using the highway upon which it abutted was originally one of the walls of a building having four sides and roofed over, the roof resting on this wall. In this condition, as part of this structure, I am willing to assume that it was not dangerous to the public, and was not a public nuisance. In fact, it had been built by the Corporation as part of an agreement with the defendant for widening the roadway, and had in its capacity as part of the structure withstood

(1) [1908] 2 I. R. 393, 402.

the assaults of wind and weather for more than twenty years. But in September, 1920, a complete change was made, for which the defendant must be held responsible. The other three walls of the building and the roof were removed, and this wall, over 70 feet in length, 15 feet 6 inches in height over the level of the footpath, and only 14 inches in thickness, was left to perform what was a new and altered function, namely, to be a boundary wall along a public highway, without the shelter and support of the other portions of the building of which it originally formed part, and its inability to perform that new function was shown by the fact that within two or three months after the change it was blown down by what nautical men would describe as a whole gale of wind or a storm, severe, no doubt, but not such as any witness that was produced ventured to say was so abnormal or extraordinary that it might not be contemplated as likely to occur in the locality. On the evidence for the defendant the velocity of the wind that day varied from 30 to 71 miles an hour, and the wall was blown down when it was about 61 miles an hour. The premises had been derelict for ten years, and no investigation as to the stability of this wall appears to have been made by the defendant or by anyone on his behalf. In my opinion, this was not the case of a structure which when it was erected was perfectly safe and not a nuisance, and then by gradual decay became insecure. It is the case of a change deliberately made in the use of the wall and the conditions under which and the purposes for which it was erected, and the defendant can be in no better position than if he had placed it there in its then condition in September, 1920; and the question is, was it then so dangerous to the public using the highway as to be a nuisance? If it was, in my opinion the defendant is liable for the injury it caused, whether he did not know or ought not to have known of its dangerous condition. This question was not put to the jury. There was strong evidence given for the plaintiffs to show that after the change the wall was dangerous in conditions of weather which might be reasonably anticipated to occur, and in point of fact it fell in a storm which no one alleged was either abnormal or extraordinary. There was no direct ruling of the Judge as to whether there was any evidence on the part of the

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defendant to show that the wall was not a danger to the public after the alterations made in September, 1920, though I gather from his report that he was inclined to think there was not. My own opinion is that there was not, and that the plaintiffs' evidence shows that it was then dangerous in conditions of weather which might reasonably be anticipated to occur, and I would be prepared to enter judgment for the plaintiffs on this ground; but my brother Pim thinks there should be a new trial, and I do not dissent from him as to this. Besides, Mr. Andrews claims that the damages found are inadequate. Mr. M'Gonigal stated in the course of his argument that if the Court were of opinion that the verdict for the defendant could not stand, he would prefer to have judgment entered for the plaintiffs for the amounts found by the jury rather than have the actions sent for a new trial; and Mr. Andrews for the plaintiffs—part of whose motion was based on the inadequacy of the damages—was willing to accept the amounts found by the jury if judgment was entered for his clients. In the view that we take we cannot do this unless the parties consent; and, in any event, without their consent we would not do anything which might prejudice or embarrass either of the parties on an appeal. Of course, if there is a new trial, the amount of damages as well as the question of liability would have to be determined on that trial.

MOORE J.:—

In this case I have the misfortune to differ from my brethren. The wall around which the issues in controversy in this action centre was built by the Corporation of Belfast for the defendant's father in 1897. It ran approximately east and west, bounding the Shankhill Road, in the City of Belfast, for a length of something like 71 feet. It originally contained two windows and four doors; the doors were built up; the windows were boarded. The wall was somewhere about 15 feet in height; it was built of brick; it was 14½ inches thick.

On the 3rd December, 1920, under stress of a storm of wind blowing from the south against the exposed back of the wall, which stood athwart its direction, the wall collapsed all along its

base on the highway, and fell over across it, killing William Mullan (husband of one of the plaintiffs), who was lawfully passing upon the street.

The action was brought by his widow on behalf of herself and their five children under Lord Campbell's Act. The right of action under this statute is given when death results from (*a*) a wrongful act, or (*b*) negligence on part of another. The plaintiff by her statement of claim pleaded as the cause of action, firstly, the negligence of the defendant in keeping and maintaining the wall in a dangerous and defective condition; alternatively, the wrongful act of the defendant in suffering the wall to be in a condition dangerous to persons lawfully passing along the highway. These are distinct causes of action. The learned Judge left the jury certain questions essential in an action for negligence, and they found that the defendant neither knew, nor ought to have known, that the wall was dangerous, and was not negligent in his dealings with it, nor in failing to anticipate that it might be thrown down by the wind. The plaintiff's counsel asked to have a question put as to whether or not the wall was a nuisance, but the Judge thought it unnecessary, and in the questions which were left to the jury the existence of a nuisance is assumed in the use of the word "dangerous" as applied to the wall. I therefore assume in the plaintiff's favour that the jury have found that the wall was a nuisance in that it was a danger to the passers-by on the highway; but they have also found that the defendant had no knowledge of the danger, and the question for us to determine is whether or not the absence of knowledge reasonably to be expected will absolve the defendant from liability for the nuisance, in the absence of a finding that he is its creator.

I have consulted the authorities to which, in the course of very interesting and able arguments on each side, we have been referred. I do not propose to set out in detail the results of my examination, but merely to state my general conclusions.

In cases of nuisance of this sort, the cause of action for the wrongful act complained of is either against the defendant as the originator, author, or creator of a danger to the persons using the highway—and he is primarily liable as such—or against the defendant as the owner or occupier of dangerous premises

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for wrongfully suffering them to continue in that condition. The defendant, of course, may also be the creator of the nuisance alternatively with the occupier of the premises: see Sir F. Pollock, Torts, 8th ed., pp. 431-2. In the present case the defendant by the statement of claim is sued as the occupier. It was his predecessor in title who had the wall built by the Corporation, and the defendant is charged that being dangerous he wrongfully suffered it to remain in that state on premises in his own occupation. The wall was not originally unsafe, and the plaintiff (as will appear from the questions which Serjeant Hanna wished to have left to the jury) contends that it only became so in May or June, 1920. If the findings of the jury on the other question are to be taken in one view as favourable to the defendant, they clear him of having done any act to cause the danger; and if the questions themselves do not involve this, then there is no finding of the jury that the defendant did by his act cause the danger, because no question on this was submitted to them: see *Coupland* v. *Hardingham* (1), approved by the Court in *Barnes* v. *Ward* (2).

It has been stated at the Bar that no case has been found in which in an action arising out of nuisance the issue of the defendant's knowledge, whether real or imputed, has been left to the jury. Certainly this is so on the criminal side of the Court in an indictment for nuisance, where the traverser is in possession of the premises, even though, as between himself and his landlord, he is not bound to repair. This is the old case of *Regina* v. *Watson* (3); and I find in Saunders on Indictments that the form of indictment for a nuisance of this nature does not allege any guilty knowledge in the traverser, but merely that he wrongfully and unlawfully suffered the danger to continue. On the civil side, the plaintiff, as in the present case—and also in *Tarry* v. *Ashton* (4) and *Palmer* v. *Bateman* (5)—generally relies on the cause of action in negligence, and there are in consequence not so many reported cases in nuisance. But the general rule would appear to be to exclude the issue of the defendant's know-

(1) 3 Campbell, 398.
(2) 9 Mainey & Scott, 417.
(3) 2 Lord Raymond, 856.
(4) 1 Q. B. D. 314.
(5) [1908] 2 I. R. 393.

ledge in all cases where the creation or introduction of the matter or thing subsequently causing the injury is in itself dangerous or likely to become so. Such are the cases where a defendant excavates near a highway, or erects a dangerous fence, or leaves an open area unfenced: *Barnes* v. *Ward* (1). The rule equally applies to dangerous erections made by the defendant, or knowingly suffered by him to be continued in their dangerous state, even where he is not himself the occupier: *Todd* v. *Flight* (2).

The reason for this rule I take to be clear from the judgments in *Rylands* v. *Fletcher* (3), affirmed and approved in the House of Lords, laying down the fundamental principle that where a man brings on his land or creates there a possible source of danger (or, what is the same thing, knowingly permits it to continue there), he is liable for all the consequences which may result from his so doing. It will be noted that Blackburn J. was one of the judges in *Rylands* v. *Fletcher* (3). But it seems to me that there may be some difference in cases where a man brings on his land in the ordinary course of dealing with it something not per se dangerous or likely to be so, and his successor, without knowledge, merely suffers it to continue. For example, as was suggested in the argument, it is not per se a nuisance for a man to plant a sapling on his own land adjacent to a highway, which is not dangerous, and may never become so, or may only become so eighty or a hundred years afterwards. In that case it would occur to me that it would be consistent with justice if the tree through gradual but concealed decay became dangerous to passers-by on the highway, that the owner, probably a successor in occupation, before being liable should be shown to have permitted it to continue as such a danger either with personal knowledge or imputed knowledge.

The question of how far knowledge of the existence of the danger is a material issue was raised by Lord Blackburn, then Blackburn J., in *Tarry* v. *Ashton* (4), and this case requires our careful consideration. The action was brought for negligence connected with the fall of a heavy lamp overhanging the street, and also (as in

(1) 9 C. B. 417.
(2) 9 C. B. N. S. 377.
(3) L. R. 3 H. L. 330.
(4) 1 Q. B. D. 314.

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the present case) for injury received from the lamp as constituting a nuisance. It appears from the case that the lamp had been erected not by the defendant, but before his occupation. The jury found that the injury was occasioned, not by personal negligence of the defendant, but by the negligence of Chappell, "the defendant's servant," who had been employed by him to repair the lamp. It was admitted at the trial that Chappell was a competent and proper person to employ. During the argument on a new trial motion *Reg.* v. *Watson* (1) was referred to, and Blackburn J. asked, "Was the lamp in such a state as to be a nuisance; if so, was it to the knowledge of the defendant?" *Barnes* v. *Ward* (2) and *Hudley* v. *Taylor* (3) were cited, and Blackburn observed that in those cases the defendants had knowledge. Lush and Quain JJ. held that there was an absolute duty on a person having a lamp projecting over a highway to maintain it in a safe state of repair, "so that the public should not (as Quain J. puts it) be prejudiced by his neglect." The judgment of Blackburn is of great importance in the present action. He points out that a lamp projecting over a public thoroughfare it not a nuisance in itself, "but if the defendant knowingly maintained it in a dangerous state," then the liability accrues. If there were a latent defect—a state of facts going directly to the issue of knowledge or non-knowledge—I doubt if the occupier would be liable. If he had knowledge, he would be liable. There was a duty on him from time to time to investigate the state of the lamp. "If he did investigate, and there was a latent defect which he could not discover, I doubt whether he would be liable."

Now, in the present case, there is a finding of the jury to the effect that the defendant was justified in not investigating, and also in not anticipating the danger. All these statements in the judgment of Lord Blackburn go to establish the view that where the defendant is sued as occupier of the land on which a nuisance exists and not as its original creator, if the subject-matter was not a nuisance originally, he ought not to be made liable for it unless he had knowledge and was in default.

(1) 2 Raymond's Reports, 856. (2) 9 C. B. 393.
(3) L. R. 1 C. P. 53.

The judgment of Blackburn in *Tarry* v. *Ashton* (1) was considered and approved in *Silverton* v. *Marriott* (2) in the Queen's Bench Division by Field and Wills JJ. The plaintiff in that case was injured by a nuisance in the nature of an obstruction to a highway on the defendant's lands. The nuisance was occasioned by the act of third parties, who pulled down a wall of defendant's on July 26th, 1887. The debris of the wall lay across the highway. The defendant became aware of this on July 27th. He did not remove the debris, and left 6 inches to 8 inches of the wall standing. The plaintiff was injured in driving over the debris on August 6th following. During the argument counsel for the defendant asked did there arise a new duty on the defendant at the moment he became aware of the defective state of the wall which required him to prevent injury to the public by reason of the wrongful acts of the trespassers. In giving judgment, Field J. says: "If the accident had occurred before defendant was aware of what had happened, I do not think he would be liable." He then quotes the judgment of Blackburn, and says it is the correct principle.

Blackburn's judgment is further approved in *Palmer* v. *Bateman* (3), an Irish authority. It was an action for negligence, as the several judgments of the Court make clear. The jury found for the defendant on the issues of negligence, and subsequently, as the injuries had occurred by the fall from a house of portion of a gutter on the highway, a motion for a new trial was made on the ground that apart from negligence the injury was caused by a nuisance in the sense in which Serjeant Hanna desired the question, in the present action, to be submitted to the jury. The Court held on the facts that there was no cause of action in nuisance pleaded, and therefore the issue as to nuisance was not open at the trial. But the argument in support of the new trial motion, negligence having been expressly negatived, proceeded on the ground that a nuisance in law existed, and that therefore the plaintiff was entitled to damages. For this reason, the observations of the Court in defining the liabilities of the occupier in nuisance are not mere obiter dicta, although the Judges held the action as brought was only for negligence.

(1) 1 Q. B. D. 314. (2) 59 L. T. 61. (3) [1908] 2 I. R. 393.

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Wright J. quotes the judgments of Blackburn in *Tarry* v. *Ashton* (1), to which I have already referred, and adopts them. He adds: "We have not been referred to any case in England or Ireland where an innocent occupier of a house has been held liable under circumstances such as existed in the present case." That means, where an occupier is by the verdict of the jury discharged from actual or imputed knowledge of the danger, there is no case in which he is held liable in either nuisance or in negligence. He proceeds: "It would be contrary to principle and to common-sense if a person who had come into possession of a house knowing nothing of this defect . . . should be held liable for an accident happening in this way." And it will be remembered that, as the jury had discharged the defendant on the issue of negligence, the only way in which it was sought to make him liable was in respect of nuisance. The foregoing is a decision of our own Court approving of the law as laid down by Blackburn J., and, in the absence of authority contra, I think it incumbent on us to follow it. I do so.

I come, therefore, to the following conclusions:—That prima facie the occupier of land on which a nuisance exists is liable for that nuisance. But while this is the general rule, it is evident that there are exceptions to it. The following are some of the elements to be taken into consideration when seeking for the exception, but I do not judicially determine that they must all co-exist in the same case. (*a*) The nuisance at the time of its introduction or creation was not then a danger, nor likely to be so. (*b*) The defendant is sued as occupier merely, and not as the original author or creator of the nuisance, who is, as I have pointed out, primarily liable. (*c*) The dangerous nature of the matter or thing is caused by latent defects, or by the acts of third parties. I read "latent defect" as equivalent to all defects of any nature whatsoever which, by the exercise of reasonable care and precaution, the defendant could not have discovered, or perhaps I should say that such defects are necessarily on the same plane as latent defects. I find it to be the law that at any rate where these elements co-exist, the plaintiff must succeed in showing that the defendant had knowledge, actual or imputed, of

(1) 1 Q. B. D. 314.

the existence of the danger. This, I think, is the only conclusion to be drawn from the judgment of Lord Blackburn in *Tarry* v. *Ashton* (1), subsequently approved in the other cases to which I have referred.

In the present case there is no finding by the jury of the cause which brought about the fall of the wall. It may have been internal decay, a latent defect, or it may have been by the act of the defendant in removing portions of the buildings behind. The plaintiff did not ask that any such question should be put. In the absence of a finding I cannot speculate on liability. It then appears that the wall when erected was not per se a nuisance; that the defendant is sued as the occupier; that there is no finding that he by himself or his servants created the danger; that there is an express finding that acting without negligence he did not know of it. I think he is in the position of "the innocent householder" instanced by Wright J. I think it lay on the plaintiff to show either that the acts of the defendant caused the nuisance, or, if they did not do so, then that he had knowledge of the danger and continued it. The plaintiff did not attempt to do the first, and wholly failed in the second. The plaintiff cannot now get a new trial in respect of an issue which he did not require to have sent to the jury at the hearing of the action.

I think the learned Judge on the foregoing facts was right in entering judgment for the defendant. The jury found against the plaintiff in negligence, and the Judge in effect non-suited her in nuisance. I think the judgment should stand, and that the present motion should be refused with costs.

Solicitors for the plaintiffs: *T. Erskine Alexander and John Graham.*

Solicitors for the defendant: *M'Gonigal & Sons.*

H. J. M'C.

(1) 1 Q. B. D. 314.

Appeal.
1920.

Nov. 4.

THOMPSON & SON, Ltd., *v.* THE KING.

Vendor and Purchaser—Contract—Agreement between parties "subject to contract."

The petitioners appealed to the Court of Appeal (1) from the decision of the King's Bench Division (2).

The Court, without calling upon counsel for the Crown, dismissed the appeal.

R. ST. J. C.

(1) In the Court of Appeal, before Sir J. Campbell C., and Ronan and O'Connor L.JJ.

(2) [1920] 2 I. R. 365.

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payable under the provisions of the Dublin Corporation Waterworks Act, 1861 (24 & 25 Vict. c. clxxii), is a local rate in respect of which the Corporation is entitled to preferential payment under sect. 49 of the Bankruptcy (Ireland) Amendment Act, 1872 (35 & 36 Vict. c. 58), and sect. 4 of the Preferential Payments in Bankruptcy (Ireland) Act, 1889 (52 & 53 Vict. c. 60). *In re an Arranging Debtor* - - - APP. 1

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The authorities referring to the jurisdiction of magistrates apply to general Courts-martial established under the Army Act. Statutory Courts-martial, like other inferior Courts, are subject to the controlling authority of the King's Bench Division by prohibition, certiorari, or habeas corpus, if they act without or in excess of jurisdiction. But a decision of a Court-martial made intra vires, though erroneous in point of law, does not entitle an accused to such relief. A Court-martial does not exceed or abuse its jurisdiction merely because it incidentally misconstrues a statute, admits illegal evidence, or rejects legal evidence. Constitution and powers of statutory Courts-martial discussed. *Rex* v. *Murphy* K.B.D. 190

2. COURTS-MARTIAL — Constitution — *Qualification of member—Person of legal knowledge and experience—Restoration of Order in Ireland Act*, 1920 (10 & 11 *Geo.* 5, *c.* 31), *sect.* 1, *sub-s.* 2 (*b*)—"*Proceedings*"—*Rule of Procedure* 95A, *Army Act*, 1881 (44 & 45 *Vict. c.* 58).] Under sect. 1, sub-s. 2 (*b*), of the Restoration of Order in Ireland Act, 1920 (10 & 11 Geo. 5, c. 31), a Court-martial, when trying a person charged with a crime punishable by death, shall include as a member of the Court a person of legal knowledge and experience. W. was sentenced to death by a Court-martial, no question as to the qualifications of the members of the Court being raised. He afterwards applied to the King's Bench Division for a writ of certiorari to quash the conviction on the ground that no certificate as to the legal knowledge and experience of a member of the Court was handed in. The application was refused on the ground that, in the absence of any objection at the trial, there was a general presumption of law that the Court was properly constituted; *omnia praesumuntur rite esse acta*. *Whelan* v. *Rex* - K. B. D. 310

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1. LANDLORD AND TENANT — Ejectment—*Increase of rent—"Rent lawfully due"—Increase of Rent and Mortgage Interest (Restrictions) Act*, 1920 (10 & 11 *Geo. 5, c.* 17).] In proceedings under the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 Geo. 5, c. 17), where a "question" arises between the landlord and tenant as to the amount of rent lawfully due, an order for possession cannot be made pending the determination of the "question" in the manner prescribed by s. 2, sub-s. 6, of the Act: so *held* by Molony C.J. and Dodd J., Pim J. dissentiente. *Dun Laoghaire District Council* v. *Moran* - - - - K.B.D. 404

2. LANDLORD AND TENANT—Notice to repair—*Sea wall—Landlord liable to repair wall—Negligence—Flooding.*] The plaintiffs in these actions, which, by an order of the King's Bench Division, were tried together, were judicial tenants to the defendant of holdings situated on a peninsula on the sea coast of Kerry, portion of which was bounded and protected by a sea wall erected by the defendant in the year 1900. When the plaintiffs' rents were revised for a new statutory term, the order of the Chief Commissioner in the case of each tenant was made "on the basis that the landlord keeps in repair as heretofore the sea wall on the western side of the townland from A to B on the map recorded," i.e., the sea wall originally erected by the defendant. During the month of September, 1918, the sea wall was damaged by high tides, which flooded the plaintiffs' holdings; and these actions were brought to recover damages

LANDLORD AND TENANT—*continued.*
in respect of such floodings. No notice of any want of repair of the sea wall had been given by any of the plaintiffs to either the defendant, who resided in London, or to a local employee of the defendant, whose duty it was to look after the sea wall, and who gave evidence at the trial that on the day before the damage was caused the sea wall was in good repair. *Held*, by the majority of the Court of Appeal (Sir J. Campbell C. and Molony C.J., O'Connor M.R. dissenting), reversing the decision of the King's Bench Division, that, in the absence of notice to the defendant of the want of repair complained of by the plaintiffs, the actions were unsustainable. *Murphy and Others* v. *Hurley* - - - K.B.D.; APP. 335

LOCAL GOVERNMENT — RIGHT TO VOTE until successor appointed — Chairman of District Council—*Local Government (Ireland) Act*, 1898 (61 & 62 *Vict. c.* 37)—*Application of Enactments Order* (22*nd Dec.*, 1898), *Articles* 35, 36, *and* 37.] The outgoing chairman of a Rural District Council who has not been re-elected a member of the Council at the triennial election, although entitled to continue in office until his successor has accepted office and subscribed the required declaration, is not entitled at meetings of the new Council to give an original vote in addition to a casting vote. *R.* (*Moore*) v. *Bennett* - - - - - K. B. D. 134

1. **MALICIOUS INJURY—Death of murdered person**—*Compensation—Statutory next-of-kin—Persons entitled to compensation—Mode of assessing compensation*—9 *Geo.* 5, *c.* 14.] Where compensation is payable under the Criminal Injuries Act (9 Geo. 5, c. 14) in respect of the death of a murdered person, the right to share in such compensation is not confined to the statutory next-of-kin of the deceased, but the County Court Judge or Judge of Assize has in each case full judicial discretion as to the persons who are to benefit. No definite rule for the assessment of compensation in such a case can be laid down, but the Court must determine in each case, considering all the circumstances in a just, generous, and reasonable spirit, what is the full compensation to be awarded. *O'Connell* v. *The County Council of Tipperary* (*South Riding*) - - APP. 103

2. **MALICIOUS INJURY—Destruction of building — Measure of compensation to lessee**—*Covenant by lessee to deliver up in good repair.*] Where the property of a lessee or tenant liable under covenant to keep and deliver it up in good and tenantable repair, and whose term could be determined by a six months' notice to quit, or

MALICIOUS INJURY—*continued.*
was about shortly to expire, is maliciously destroyed, the measure of compensation under the Criminal Injuries Code is the cost of reconstruction. So *held* by the Court of Appeal (Sir J. Campbell C. and Ronan L.J., O'Connor L.J. dissentiente). *Hepenstall* v. *County Council of Wicklow* - - - - - APP. 165

3. **MALICIOUS INJURY—House destroyed by means of unlawful act**—*Compensation—Malicious Injuries* (*Ireland*) *Act*, 1853 (16 & 17 *Vict. c.* 38, *s.* 1).] An unoccupied house, the property of the applicant, was taken possession of by trespassers, who utilized it for manufacture of explosives to be used for unlawful purposes. Whilst the trespassers were so engaged, an explosion occurred which wrecked the house. *Held*, by the Court of Appeal, that the damage to the house was "sustained . . . by means of" an unlawful act within the meaning of sect. 1 of the Malicious Injuries (Ireland) Act, 1853, and that the applicant was entitled to compensation. *Colclough* v. *Wexford County Council.* APP. 391

4. **MALICIOUS INJURY—Larceny by third parties**—*Riot—Shop demolished—Stock-in-trade thrown into street—Right to compensation for loss of stolen goods.*] During a riot a number of soldiers demolished the shop-front of the respondent's premises, and flung a quantity of the stock-in-trade, consisting of boots, into the street. The rioters had no intention of committing, and did not commit, a larceny; but quantities of the boots were stolen by unascertained persons, who took the opportunity of plundering during the confusion caused by the riot. The respondents claimed compensation for the loss of the stock-in-trade stolen, as well as for the damage to their premises. On case stated it was found as a fact that the loss of the stock-in-trade by larceny was an immediate result of the wrecking of the premises by the rioters, and the scattering about and exposure of the goods partly in the shop and partly in the public street. *Held* (O'Connor L.J. dissenting), that the entire injury was the direct result of the action of the rioters, whose sole and dominating motive was to injure property; that the larceny was the natural and probable consequence of the malicious act of demolishing the shop and scattering the goods, and that the respondents were entitled to compensation for the loss of the stolen goods. *Tyler & Sons* v. *Cork County Council* - - - - APP. 8

5. **MALICIOUS INJURY — Measure of compensation**—*Damage to buildings—Owner in fee in possession.*] The measure of compensation for the malicious destruction of or injury to a building

MALICIOUS INJURY—*continued.*
in the possession of a claimant as owner in fee is not necessarily the cost of the restoration or reinstatement of the building. The Court should award full compensation in moneys numbered for the injury or loss sustained by the owner, due regard being had to all the circumstances of the case, including the potential value, as well as the existing value, to the owner of the property destroyed or injured. *Murphy* v. *Wexford County Council* - - - - - - APP. 230

6. **MALICIOUS INJURY — Shops burglariously broken into**—*Goods selected and stolen—Other goods damaged—Compensation.*] A number of persons burglariously entered a shop, tossed about a certain quantity of stock in making a selection, and took away articles of considerable value for their own use and benefit. The County Court Judge awarded compensation in respect of the damage done to the shop and to the goods, but refused compensation in respect of the stolen goods. On appeal this decision was affirmed by Molony C.J. (Tralee Assizes). On case stated, the Court of Appeal (1) *held* that the applicants were entitled to compensation in respect of the value of the goods stolen as well as for the damages to their premises and stock. *Kirby and Another* v. *Kerry County Council* - APP. 388

MARTIAL LAW AREA—Action, durante bello, for the destruction of property in, stayed - - - - - - 386
See WAR.

1. **MARTIAL LAW—Rebellion**—*Jurisdiction of the King's Bench Division.*] The King's Bench Division of the High Court has the power when its jurisdiction is invoked to decide whether a state of war exists which justifies the application of martial law; but once such a condition of affairs is established to the satisfaction of the Court, it cannot interfere to determine what is or what is not necessary. *Held*, following *Rex* v. *Allen* (see No. 3), that a state of war still existed in the martial law area, and accordingly that the Civil Courts had no jurisdiction durante bello to interfere with the decision of a Military Court sitting therein. *Rex* (*Garde and Others*) v. *Strickland* - - - - - K. B. D. 317

2. **MARTIAL LAW—Rebellion**—*Jurisdiction of the King's Bench Division.*] When a state of facts exists which justifies the imposition of martial law, the forces of the Crown, without any proclamation, may be employed in executing it. *Held*, following *R.* v. *Allen* (see No. 3), and *R.* v. *Garde* (see No. 1), that such a state of

MARTIAL LAW—*continued.*
facts existed in the present case, and accordingly that the Court had no jurisdiction to inquire into, or pass judgment upon, the conduct of the Commander of the Forces in repressing rebellion. *Rex* (*Ronayne and Mulcahy*) v. *Strickland* K. B. D. 333

3. **MARTIAL LAW**—*Sentence of death by military Court—Rebellion—Warfare of a guerilla character—Offence not punishable capitally under ordinary law—No jurisdiction in Civil Courts to intervene.*] The Civil Courts have no jurisdiction durante bello to interfere with the decision of a Military Court sitting in a martial law area, even where a capital sentence has been pronounced, and is about to be executed, for an offence not punishable capitally under the ordinary criminal law. *The King* v. *John Allen* - - - K. B. D. 241

MARTIAL LAW - - - - 190
See COURTS-MARTIAL. 1.

MILITARY COURT—Death sentence by, for offence not punishable capitally by ordinary law - - - - 241
See MARTIAL LAW. 3.

MORTGAGE OF LIFE ASSURANCE POLICY—Equity of redemption order and disposition of bankrupt 377, 384
See BANKRUPTCY—ORDER AND DISPOSITION.

NEGLIGENCE—Joint negligence of bailee and third party—*Collision between motor cars—Bailor's right to damages—Doctrine of identification.*] A intrusted his motor car to C for repairs. The car was taken out by a servant of C for the purpose of testing its engines. It came into collision with a lorry belonging to B, driven by B's servant. In an action for damages brought by A against B, the jury found that the driver of the lorry had driven at an excessive speed, and that the driver of the motor car was negligent in not keeping a proper look-out. They also found that the driver of the lorry could not, by the exercise of reasonable care and caution, have avoided the consequences of the other driver's negligence. On these findings Gordon J. gave judgment for the plaintiff. This judgment was set aside by the King's Bench Division on the ground that the bailor was so far identified with the bailee as to disentitle him to recover damages in respect of injuries to the subject-matter of the bailment resulting from the joint negligence of the bailee and a third party. *Held* (reversing the King's Bench Division and restoring the judgment of Gordon J.), that the doctrine of identification of bailor and bailee is not applicable in relation to liability for negligence. *Wellwood* v. *Alexander King, Ltd.* K. B. D. 274

NEGLIGENCE—Non-repair of sea wall—No notice to landlord of want of repair 335
See LANDLORD AND TENANT. 2.

NEXT-OF-KIN—Compensation for murder of deceased not confined to - - 103
See MALICIOUS INJURY. 1.

NUISANCE — *Negligence — Highway — Unnecessary to prove defendant's knowledge of nuisance—Fall of wall on persons lawfully using highway.*] A wall on the land of the defendant abutting on a public highway was blown down during a severe storm, and killed three persons. The plaintiffs claimed damages under the Fatal Accidents Act (9 & 10 Vict. c. 93), and the jury negatived negligence on the part of the defendant. The Judge at the trial declined to direct the jury on the question of nuisance. *Held*, per Pim and Gordon JJ., that the wall being a nuisance it was unnecessary for the plaintiff to prove that the defendant knew, or ought reasonably to have known, of its defective condition; and accordingly that a new trial should be ordered. *Per* Moore J., dissentiente, following the judgment of Blackburn J. in *Tarry* v. *Ashton* (1 Q. B. D. 314), and the judgment of the Court in *Palmer* v. *Bateman* ([1908] 2 I. R. 393), that where the occupier of premises is sued in nuisance, and where (*a*) he is not the original creator or introducer of the nuisance, (*b*) where the matter or thing was not at the time of its creation or introduction dangerous per se, (*c*) where the matter or thing subsequently becomes dangerous through defects not reasonably to be discovered, the plaintiff to succeed must establish actual or imputed knowledge in the occupier of the existence of the nuisance. *Mullan and Others* v. *Forrester* K. B. D. 412

"Omnia præsumuntur rite esse acta" applied 310
See COURTS-MARTIAL. 2.

POLICE OFFICER—Arrest of innocent person—Apprehension of danger to - 51
See ARREST.

1. PRACTICE, Appeal—From remitting order *after security for costs had been fixed on plaintiff's application.*] A remitting order was made by the King's Bench Division unless the plaintiff, within ten days, gave security for the defendant's costs to the satisfaction of a Master. On the application of the plaintiff, the amount of the security was fixed. Subsequently plaintiff served notice of appeal against the remitting order. *Held*, that the plaintiff, having elected to act upon the order, could not appeal against it. *M'Hugh* v. *M'Goldrick* - - APP. 163

2. PRACTICE—Service out of the jurisdiction —*Contract by correspondence — Acceptance—New and material term—R. S. C.*, 1905, *Order XI, r.* 1 (*f*).] In the course of correspondence an Irish firm agreed to act as agents for a Scotch firm, but no reference having been made to any date upon which the agency under the contract was to commence, the Irish firm wrote on June 10th, 1911: "We will agree to carry on your agency as from the 1st July next on the terms and conditions specified in our joint correspondence." To this communication the Scotch firm replied on June 12th: "We . . . note with pleasure that you are agreeable to carry on the agency . . . as from the 1st prox. on the terms and conditions specified in our joint correspondence." The Irish firm instituted proceedings against the Scotch firm, claiming damages for breach of contract. *Held*, by the King's Bench Division, that the mention in the letter of June 10th of a date upon which the agency was to commence did not introduce a new term, and that, as the contract was made or entered into in Ireland, leave to issue and serve a writ out of the jurisdiction ought to be given to the Irish firm. *Held*, by the Court of Appeal (reversing the King's Bench Divison), that the letter of June 10th introduced a new and material term, and that the acceptance of that new and material term having been by a letter written in Scotland, leave to issue a writ for service out of the jurisdiction could not be given. *Wheeler & Co., Ltd.*, v. *John Jeffrey & Co.*
[K.B.D. 395; APP. 401

PRACTICE (MATRIMONIAL)—Alimony— *Sum fixed by Consent—Power of Court to vary—Lapse of time—Or.* 70, *r.* 58.] The Court has jurisdiction to vary the amount of alimony fixed by consent of the parties; and made an order increasing the amount payable notwithstanding the lapse of eleven years, the husband's means having considerably improved in the interval. *Magowan* v. *Magowan* - - - - - K.B.D. 314

PRACTICE—STAY OF PROCEEDINGS—
Action durante bello for destruction of property in martial law area by military forces - - - - - 386
See WAR.

PREVIOUS STATEMENT—Cross-examination of witness as to - - 190
See COURTS-MARTIAL. 1.

REPAIR—No notice of necessity for, to sea wall [335
See LANDLORD AND TENANT. 2.

RULES AND ORDERS—R. S. C., 1905—Or. 11, r. 1 (*f*) - - 395, 401
See PRACTICE. 2.

—— —— R. S. C., 1905—Or. 70, r. 58 - 314
See PRACTICE (MATRIMONIAL).

—— —— Application of Enactments Order (22nd December, 1898)—Articles 35, 36, 37 [134
See LOCAL GOVERNMENT—RIGHT TO VOTE.

SECURITY FOR COSTS having been fixed on the plaintiff's application after an order to remit the action, an appeal by plaintiff from the order was precluded 163
See PRACTICE. 1.

STATUTES—16 & 17 Vict. c. 38 - 391
See MALICIOUS INJURY.

—— 20 & 21 Vict. c. 60, s. 313 - - 377
See BANKRUPT—ORDER AND DISPOSITION.

—— 24 & 25 Vict. c. clxxii—Dublin Corporation Waterworks Act, 1861 - - - 1

—— 28 & 29 Vict. c. 18, s. 5 - - 190
See COURTS-MARTIAL. 1.

—— 35 & 36 Vict. c. 58, s. 49 - - 1
See BANKRUPTCY—ARRANGEMENT.

—— 44 & 45 Vict. c. 58 - - - - - 190
See COURTS-MARTIAL. 1.

—— 52 & 53 Vict. c. 60, s. 4 - - - 1
See BANKRUPTCY—ARRANGEMENT.

—— 61 & 62 Vict. c. 37 - - - - - 134
See LOCAL GOVERNMENT — RIGHT TO VOTE.

—— 6 Edw. 7, c. 58, s. 1, sub-s. 1 - 44
See WORKMEN'S COMPENSATION ACT.

—— 5 Geo. 5, c. 8 (Defence of the Realm Consolidation Act, 1914) - - 190
See COURTS-MARTIAL. 1.

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—— 9 Geo. 5, c. 14 - - - - - 103
See MALICIOUS INJURY. 1.

—— 10 & 11 Geo. 5, c. 17 - - - 404
See LANDLORD AND TENANT.

—— 10 & 11 Geo. 5, c. 31, Restoration of Order in Ireland Act, 1920 - - 190
See COURTS-MARTIAL. 1.

—— 10 & 11 Geo. 5, c. 31, Restoration of Order in Ireland Act, 1920 - - - 310
See COURTS-MARTIAL. 2.

WAR—Destruction of property in martial law area—*Jurisdiction to hear action for, durante bello—Stay of proceedings.*] So long as a state of war exists, an action for damages for alleged wrongful destruction of property by military forces in a martial law area cannot be tried; but the plaintiff has a right to have his case proceeded with so soon as a state of war no longer prevails. An order was made, accordingly, staying such an action until further order. *Higgins* v. *Willis* [K.B.D. 386

WATER RATE — Contract — Preferential payment - - - - - - 1
See BANKRUPTCY—ARRANGEMENT.

WITNESS—Arrest of, for protection - 51
See ARREST.

WILL — PROBATE — Dependent relative revocation—*Duly executed will subsequently destroyed—Proof of contents by production of draft—Later testamentary disposition signed by testator, but not witnessed—Destroyed will admitted to probate.*] A. E. W. duly made his will in the month of February, 1913. He died on 9th September, 1919. After his death, on search being made for the will, it could not be found. Amongst his papers was found, however, an envelope marked "my last will, made Jan. 26, 1918," and also "one made Febfuary, 1913, destroyed." In the envelope was a testamentary writing, dated 26th January, 1918, apparently based in form on the will of February, 1913, and signed by the said A. E. W., but not witnessed. A draft of the will of February, 1913, was produced by the testator's solicitors, and put in evidence as proving the contents of the destroyed will. In an action by the executrix of the will of February, 1913, claiming probate in solemn form of the contents

WILL—*continued.*
thereof as proved by the said draft, it was *held*:—1. That the destruction of the will of February, 1913, was conditional on the testator's belief that the testamentary writing of 26th January, 1918, would be effective as a will. 2. That the testamentary writing of 26th January, 1918, was not effective as a will, and that therefore the doctrine of dependent relative revocation applied. 3. That the contents of the will of February, 1913, as proved by the said draft thereof, should be admitted to probate in solemn form. *West* v. *West* [K. B. D. (Prob.) 34

WORDS—"Goods or Chattels" - 377, 384
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WORDS—*continued.*
——— "Local Rate" - - - - - 1
See BANKRUPTCY—ARRANGEMENT.

——— "Sustained . . . by means of" - 391
See MALICIOUS INJURY. 3.

WORKMEN'S COMPENSATION ACT — Domestic servant—*Accident—Arising out of and in the course of employment—Workmen's Compensation Act*, 1906, *sect.* 1, *sub-s* 1.] While a cook, in the course of her employment, was walking across the kitchen in her master's house, her slipper commenced to fall off, and on stooping to re-adjust it, she fell and sustained injury. *Held* (Ronan L.J. *dubitante*), not to be an accident arising out of the employment. *Hannafin* v. *Fitzmaurice* - - - - - APP. 44

THE END

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